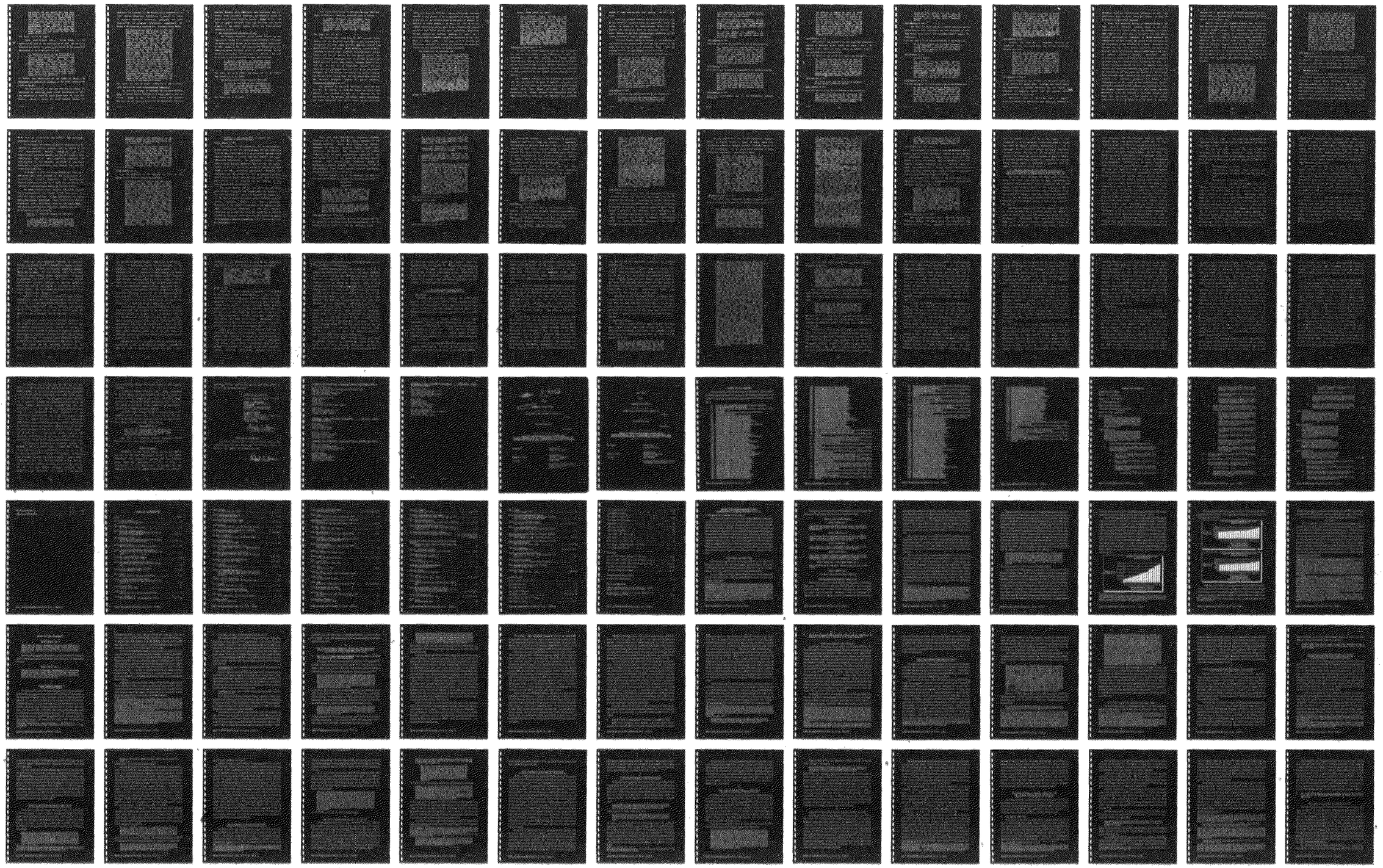

> Legislature to set apart not less than one-tenth of the annual revenue of the State derivable from taxation, as a perpetual fund, which fund shall be appropriated to the support of free public schools, and no law shall ever be made diverting said fund to any other use; and until such time as the Legislature shall provide for the establishment of such schools in the several Districts of the State, the fund thus created shall remain as a charge against the State passed to the credit of the free common school fund.

Tex. Const. art. X, §2 (1845)

Texas constitutional scholar, George Braden, in his authoritative work on the Constitution of 1876, and the prior constitutions before it, noted in his review of the historical development of the Constitution of 1845:

> The education article in the Constitution of 1845 reflected an attempt to accommodate the various philosophies of education, some irreconcilable, held by the new Texas-Americans. One camp, which included German immigrants, felt that the state should provide free public education for all. Southern aristocrats believed that, except for aid to indigents, education was an entirely private function, while many other Anglos adhered to the Puritan concept under which both church and state shared responsibility for education.

G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis at 505 (1977) [hereinafter cited as Braden].

The Constitutions of 1861 and 1866 did not change the provisions for education found in the Constitution of 1845. The occupation of Texas by union forces after the Civil War, however, created a climate for broad sweeping changes for

education, as reflected in the Reconstruction Constitution of 1869. Another commentator, Professor A. J. Thomas, Jr., while at Southern Methodist University, researched the Texas Constitution and prepared interpretive commentaries for Vernon's Annotated Texas Constitution. Professor Thomas noted:

> The Reconstruction Constitution of 1869 was representative of New England rather than Texas educational tradition. It required for the first time a uniform system of public free schools for the gratuitous instruction of all inhabitants between the ages of 6 and 18 (Art. IX, §1) with compulsory attendance (Art. IX, §5) and a highly centralized system of school administration (Art. IX, §3). The first laws passed complying with the new constitution were treated with indifference, resulting in the law of 1871 (6 Gammel's Laws of Texas, 945-958) which organized the school system along military lines, the state assuming absolute authority over the training of children. A state board of education was set up empowered to act in place of the legislature in school affairs. A 1% tax upon all property was levied to support the school system; this aroused violent antagonism from a large group of Texans who felt that it was illegal confiscation to compel one man to pay for the education of the children of another. Compulsory attendance was looked upon as a machination of autocratic governments, and state rather than parental selection of teachers was decried as a violation of the rights of a free democratic people.

Tex. Const. art. VII, §1 interp. commentary at 374-75 (Vernon 1955) [hereinafter cited as Interpretive Commentary].

By 1875, the attempt to implement the elaborate Northern model of public schools resulted in a school debt of over $4 million. Braden at 506. By 1875, however, the Southern majority, who had regained control of the legislature from the

minority Northern Union supporters, were determined that the present state controlled, elaborate, and expensive system of public school finance would be changed. Braden at 506. The court of appeals correctly noted this political and social climate in the events leading up to the Constitutional Convention of 1875.

3. The Constitutional Convention of 1875

The Southern majority, having gained control of the legislature, called for a Constitutional Convention to correct the perceived evils wrought by the Reconstruction Constitution of 1869. Braden at 506. The Constitutional Convention of 1875 added the phrase "efficient system of public schools" to the education provisions. Prior to that time, Section 1 had read as follows in the Constitutions of 1845, 1861, and 1866:

> A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of public schools.

Tex. Const. art. X, §1 (1845); Tex. Const. art. IX, §1 (1861); Tex. Const. art. X, §1 (1866).

The Reconstruction Constitution of 1869 read:

> It shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years.

Tex. Const. art. X, §1 (1869).

Only in the Constitution of 1876 did the word "efficient" appear in Section 1. Section 1 presently reads as follows:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. [Emphasis added].

Tex. Const. art. VII, §1.

The Constitutional Convention of 1875 contained bitter debates over the education provisions of the proposed Texas Constitution of 1876. Many Northern delegates favored free public schools for everyone. Other delegates, mostly Southern, supported a system that promoted state-subsidized private schools, and did not require any free public schools. The Southern delegates compromised with the Northern delegates and agreed upon the "public free schools" language found in art. VII, §1. As part of the compromise, however, the word "efficient" was introduced into art. VII, §1 by the Southern delegates, who had conceded the "public free schools" language and who were still reeling under the huge school debt caused by the Northern delegates' system of public education. Interpretive Commentary at 375.

The inclusion of the word "efficient", which now made art. VII, §1 require "an efficient system of public free schools", was intended to act as a deterrent to the continuation of the Northern influenced, highly centralized, and state controlled free public school system instituted

immediately after the Civil War. The word "efficient" was used because it was thought to be an equivalent of simplicity and minimality, or, as correctly noted by the court of appeals, an exercise in "close economy." In short, art. VII, §1 of our present Constitution was not meant to be a flexible and organic provision that would provide equal educational opportunity through uniform and equitable spending per pupil, or a "cost-efficient/non-wasteful system" as determined by the trial court (Tr. 601); rather, it was meant to be a limiting and restrictive provision to prevent an elaborate and expensive system like that devised by the Northern delegates.

One commentator has announced that:

> The wrath that had been steadily mounting against the education system imposed under Reconstruction reached its peak in the Convention of 1875. Delegates represented the many and varied views of education that had gained support among diverse elements of the frontier society, and no part of the Constitution of 1876 was debated more bitterly or thoroughly than Article VII. A minority report favoring the old system of state-subsidized private schools was rejected in favor of an efficient system of public free schools (Sec. 1), but with constitutional limitation on taxing and administrative authority. In reality the education article was not a mandate to establish an efficient public free school system at all but was intended, rather, as a restrictive document to prevent establishing an elaborate and expensive system like the one devised by the hated Republicans. [Emphasis added].

Braden at 506.

Another noted scholar has stated:

> The bitterest fought article of the Constitutional Convention of 1875 was the article on education, as finally adopted it was a compromise falling short of the needs of the time. Those in favor of free education for all were successful in defeating the distinction between "public" and "free" schools, retaining the phrase "public free schools." Those preferring the old system of state subsidized private schools introduced the word "efficient on the theory that efficiency was the equivalent of simplicity and deeply ingrained custom and hence would be an effective deterrent to the continuation of the reconstruction state-controlled free public school system. [Emphasis added].

Interpretive Commentary at 375.

At trial, Dr. Walker testified that the word "efficient" was used by the framers of the Constitution to mean "not extravagant." (SF 1986, 2043-44). Dr. Walker further testified that "equity" was not a consideration to the framers of the Constitution (SF 2051-52), and that "efficient" was not intended to promote high expenditure levels for the provision of public education by the framers of the Constitution (SF 2062-63).

Dr. Walker's testimony of the historical background of art. VII, §1 supports the court of appeals' conclusion that art. VII, §1 came about as a reaction to prior school finance systems which were deemed extravagant (SF 2062-63). Furthermore, Dr. Walker concurred with Respondents that the Texas Constitution authorizes and implements the challenged

system of State funding plus local funding. (SF 2077, 2119, 2154).

Historical evidence supports the position that art. VII, §1 was intended to provide a basic, yet sufficient, educational system. A review of the Constitutional Debates of 1875 supports the conclusions drawn by historical scholars. S. McKay, Debates in the Texas Constitutional Convention of 1875 (1930) [hereinafter cited as 1875 Debates].

First and foremost among the concerns of the delegates to the Constitutional Convention of 1875 was the poverty of the State and the need to avoid unnecessary taxes. Among the comments found in the 1875 Debates are the following:

From the twenty-first day of the Convention; Delegate Sansom:

> Now, sir, do we want public schools? I may be answered, yes, if they do not cost too much. The experience of those states that have tried them demonstrates that they cost about one million dollars to the 100,000 of scholastic population, and our scholastic population will now reach perhaps 350,000. Can we bear taxation to that extent, or to the half of it? I say, no. And now, in view of the cost of a system of public free schools, in view of our poverty -- for say what we will, we are the poorest State in the Union -- and in view of the sparsity of our population and the unremunerative character of our capital, I again ask, is such a system adapted to our condition? Is it one of our wants? And again my judgment and conscience both answer no.

1875 Debates at 107.

From the reports of the twenty-ninth day of the Convention:

> Mr Sansom opposed the majority report, and condemned the exercise of the despotic power that would enforce direct taxation for the

public education. He made an effort to show that crime was not attributable to lack of education, but to other causes.

Mr. Abernathy opposed the amendment. He was willing to compromise on one-tenth of the annual revenues of the State for educational purposes. He said the people were financially embarrassed and could not afford more than that amount.

Mr. Graves opposed the amendment. He thought the people were neither able nor willing to support the schools under the plan of Mr. Dohoney.

1875 Debates at 201.

From the reports of the thirty-first day of the Convention:

Mr. Sansom said he desired simply to say that the people wanted no taxes levied for the maintenance of public schools. He said he knew not one taxpayer in his entire county when he canvassed the county who expressed a wish to continue the public schools by taxation. He did not believe the people of Texas wanted to go one step in that direction. It was this school tax that the people had complained so much about.

1875 Debates at 219.

From the thirty-second day of the Convention; Delegate McLean:

Our population is too sparse to admit of the establishment of a general system of public education. We have had some public schools and have made some spasmodic efforts at a public school system since the war, but they have been total and disastrous failures and all because our population is too sparse to allow the practical application of a system that shall be equal in its burdens and its benefits.

1875 Debates at 227.

From the forty-seventh day of the Convention; Delegate Robertson:

> The question is whether we shall be taxed now in 1875 and whether we shall say so in our organic law. Perhaps the country was prepared to do in 1869 what it did do; but we are sent here to prepare a Constitution for the present people of Texas, one that will be sustained fairly and freely. And we shall fail, I am afraid, unless we offer them such a Constitution as they can approve with regard to taxation. There is nothing they cry more loudly for than low taxes, and they will accept almost any Constitution that guarantees protection to life and liberty; but low taxes they must have.

1875 Debates at 353.

Additionally, the delegates in 1875 addressed resentment against an elaborate school system and urged a basic, yet adequate school system for Texas. Among the comments found in the 1875 Debates are the following:

From the reports of the thirty-first day of the Convention:

> Mr. Allison said that so far as he knew his constituents they would oppose any increase of taxation for the purposes set forth in the Ballinger amendment. There were three parties in the Convention on the question before them -- one against all taxation, one for small taxes, and one for something like the Ballinger substitute. He thought the people were opposed to that or any other magnificen school system. [Emphasis added].

1875 Debates at 213.

> Mr. Cline spoke next in favor of an adequate school system. [Emphasis added].

1875 Debates at 215.

From the reports of the forty-sixth day of the Convention:

> Mr. Graves said that even $3 a head for the scholastic population would not amount to anything for free schools. He said the people could not bear sufficient taxation to establish an eloquent school system. To

> establish free schools for one, two, or three months in the year, while it would be inefficient as a system, would destroy the private schools of the State. [Emphasis added].

1875 Debates at 348.

The issue of local control of public education and the possibility of local enrichment was also discussed in 1875. (See Walker at SF 2175). The following comments support this conclusion:

From the reports of the thirty-second day of the Convention:

> Mr. Dohoney offered the following amendment to the amendment: Provided that the taxes raised under this provision shall be applied to the public schools in the county where they are collected.

1875 Debates at 225.

> Delegate McLean:
>
> The amendment of my colleague (Colonel DeMorse) proposes to provide in the population districts of Texas, where public schools may be desired and can be maintained, that the people shall have the privilege of taxing themselves to support these schools, the property-holders being the judges of the necessity and the amount of taxation, which is not to exceed one-fourth of 1 per cent. [Emphasis added].

1875 Debates at 227-28.

From the reports of the forty-seventh day of the Convention:

> Mr. Moore said none had yet spoken in favor of the report of the special committee...A Constitution was in itself a compromise, and so was the report a compromise, so that their work might conform to the opinions of a majority of the Convention. He claimed that the issue had not been fairly made. The issue was simply whether the Convention felt authorized to destroy or promote a

> system of free schools, or would it pursue the more conservative course and leave the question to the people of Texas. The report was never intended to devise a system of taxation for that purpose, beyond the poll tax of $2. He estimated that the available fund from all sources would amount annually to about $720,000. According to the vote of the Convention they would have no Superintendent of Public Instruction. The amount specified would be sent to the various counties to apply to educational purposes, and would soon be augmented by their own county funds. [Emphasis added].

1875 Debates at 349.

Finally, the need for a compromise position was recognized. From the twenty-ninth day of the Convention; Delegate Whitfield:

> There are two extreme views on the question, each advocated by able and conscientious gentlemen, to neither of which can I subscribe. The one view would substantially refuse to do anything to promote through State agencies the education of the children of the State. The other would go too far in the opposite direction, by imposing upon the people of today burdens which would be not only unjust but also unwise. There is, I am assured, a medium ground upon which all can unite and accomplish the greatest good possible within our reach.

1875 Debates at 196-97.

And a compromise was reached. An efficient system of public schools was agreed upon. A system that would require the legislature to provide education, but not require an elaborate or expensive system like the previous system instituted after the Civil War.

Petitioners seek to rebut the court of appeals' historical analysis by referencing some additional comments by

delegates from the Constitutional Convention of 1875. See Petitioners' Brief at 63-66. There are, however, at least two problems with Petitioners' approach.

First, the selective quoting of certain delegates and their views on education, standing alone, is not truly indicative of the overall views of the delegates as a body. Such comments are useful only to the extent that they support reliable extra-judicial commentary by noted scholars and commentators who have studied the history of the convention and the proceedings of the delegates as a whole. Respondent has provided the court with several historical conclusions by prominent Texas constitutional scholars which support the court of appeals' historical analysis. Petitioners' expert historian, Dr. Walker, testified as to the history of education in Texas and the Constitutional Convention of 1875. Dr. Walker's testimony supports the court of appeals' historical analysis and conclusions regarding the intent of the framers of the Constitution and the voters who adopted it. Petitioners, while providing select passages from the 1875 Convention, have presented no scholarly commentary to support their interpretation of the intent of the constitutional framers. Petitioners presented neither evidence nor testimony at trial, nor reliable argument and authority in their Briefs, to rebut Respondents' historical research -- historical research which shows that the intent of the framers of our present Constitution was not to boldly carry the banner of education

forward, but to sensibly retreat from the extravagance of prior school financing systems which had nearly bankrupted the State shortly after the Civil War.

Second, some of the delegate comments that Petitioners have provided the court for review are minority views taken out of their proper context. For example, Petitioners quote Delegate Sansom as arguing for "efficiency" and correlating this argument to a plea for substantial state resources for education. See Petitioners' Brief at 63-64. Delegate Sansom's views on education, however, could not be further away than Petitioners' views. Had Petitioners simply continued to read from the same record of Delegate Sansom that they have quoted from so extensively and authoritatively, they would have found the very next sentence, and remaining argument, to be as follows:

> And I can see as clearly, sir, that, if Smith will turn over to the State the money he spends annually for sugar, tea, canned fruits, jellies, lawns, muslins, silks, laces, flowers, flounces, furbelows, broadcloth, box-toed boots, fancy neckties, and plug hats, the State can, with the amount, feed and clothe the families of both Smith and Brown on cornbread, jerked beef, coffee straight, brown domestice, calico, wool hats, and brogans, and still have enough left to pay for the trouble. And I can also see how, if all the Smiths in the State will turn over to the State all the money they spend on pew rent, spittoons, footstools, cushions for pews, and other incidental expenses they pay for their churches, the State can, with the amount, build less costly houses of worship, hire $250 preachers, and furnish facilities to all the Smiths and Browns in the State, though the article of divinity might not be

> altogether palatable. And I can see as palpably how a sack of flour is cheaper to a man when the State takes $5 out of his neighbor's pocket to pay for it, and sends it home to him, than it is when he has to work for the money to buy it and has to pack it home on his shoulder, and I think I can see as clearly as that, if the State has the right to do one of these things it has the right to do all of them. If the State may upon the plea of 'necessary to the general welfare' take under its control the education of the people, it may, upon the same plea, with the same propriety take charge of their religion, for if education be necessary to the maintenance of good government, the observation of the precepts of religion is more so, and if the State has the right to enforce agrarianism for one purpose it has for another, and if it may do so to any extent or upon any pretext, it may do it for any purpose, and to any extent.

1875 Debates at 110-11.

Delegate Sansom obviously speaks with bitter sarcasm when he speaks in "apparent" favor of state controlled and funded education as Petitioners would have the court believe based upon the misrepresentative quote provided in their Brief.

4. The Modern Era.

Petitioners appear to place great reliance on the actions of the Texas legislature in 1948 in creating the Gilmer-Aikin Committee to address public education needs in Texas. See Petitioner-Intervenors' Brief at 16, 46. Petitioners argue that "legislative expressions are important because legislative and executive interpretations of a constitutional provision, acquiesced in by the people and long continued, are of great weight in determining a provision's meaning, and in case of

doubt will be followed by the courts." See Petitioner-Intervenors' Brief at 17.

To the extent that recent legislative interpretations are relevant to constitutional analysis, then the results of the 1973 Constitutional Revision Commission, the 1974 Constitutional Convention Debates, and the 1975 proposed Texas Constitution, each of which explicitly addressed the interpretation of the education provisions of the Texas Constitution, are significantly more relevant than the 1948 Gilmer-Aikin Committee.

On November 7, 1972, the voters adopted art. XVII, §2 to the Constitution which provided for the establishment of a constitutional revision commission. The constitutional revision commission was set up to study the Constitution and recommend to the legislature changes to the Constitution.

The Texas Constitutional Revision Commission reported their recommendations for changes in the Constitution in a published report entitled: A New Constitution for Texas: Text, Explanation, Commentary. Texas Constitutional Revision Commission, (1973) [hereinafter cited as the C.R.C. Report]. The Constitutional Revision Commission recommend that art. VII, §1 be revised to read as follows:

> Section 1. Equitable Support of Free Public Schools
>
> (a) A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable provision for the

> equitable support and maintenance of an efficient system of free public schools and to provide equal educational opportunity for each person in this State.
>
> (b) In distributing State resources in support of the free public schools, the Legislature shall ensure that the equality of education made available shall not be based on wealth other than the wealth of the State as a whole and that State supported educational programs shall recognize variations in the backgrounds, needs, and abilities of all students. In distributing State resources, the Legislature may take into account the variations in local tax burden to support other local government services.

C.R.C. Report at 129.

In the commentary to the proposed art. VII, §1 the Constitutional Revision Commission remarked:

> Proposed Section 1 requires the Legislature to support the free public schools equitably, guarantee each person an equal educational opportunity, and ensure that the quality of education available to each person, insofar as the quality of education is a function of financial resources, shall depend only on the wealth of the state as a whole. It imposes a requirement that variations in the backgrounds, needs, and abilities of students be taken into account by the Legislature in providing resources for the free public schools. Also, it recognizes that taxpayers in urban areas are burdened with taxes to support a wide range of municipal services and it allows the Legislature to take that fact into account in distributing state resources. The Commission decided not to prescribe or suggest a specific formula to accomplish the requirements of Section 1. Such a provision would be statutory in nature and would unnecessarily limit the options available to the Legislature. The Commission intends Section 1 to be a strong statement of the educational policy of this state and a

> mandate to the Legislature to support the free public schools equitably.

C.R.C. Report at 129.

The relevance of the proposed art. VII, §1 and commentary quoted above is that the Constitutional Revision Commission believed that nothing short of a constitutional amendment could require the State to provide "equitable support" and "equal educational opportunity." The implication is clear. The Constitutional Revision Commission believed that the present wording in art. VII, §1 did not provide or require "equitable support" or "equal educational opportunity." Therefore, the conclusion that the present art. VII, §1 requires the Texas school financing system that the trial court held the State must provide is not supported by the findings of the Constitutional Revision Commission.

The heated debates over art. VII, §1 in the 1974 Texas Constitutional Convention also suggest that the delegates to the 1974 Constitutional Convention believed the present art. VII, §1 did not require the public school financing system to provide "equitable support" or "equal educational opportunity." The verbatim transcripts of the debates of the Texas Constitutional Convention of 1974 were recorded, transcribed and printed into a two (2) volume set of Official Proceedings entitled: Texas Constitutional Convention, Record of Proceedings - Official Proceedings (1974) [hereinafter cited as 1974 Debates].

There were nine Constitutional Convention proposals concerning art. VII, §1 and over twenty amendments to the proposed provisions. Almost every proposal and amendment addressed the need for "equitable support" and/or "equal educational opportunity." The proposals and all written commentary from the Texas Constitutional Convention of 1974 were printed into a two (2) volume set of Official Journals entitled: Texas Constitutional Convention, Record of Proceedings - Official Journals (1974) [hereinafter cited as 1974 Journals]. Some notable excerpts from the 1974 Debates and 1974 Journals are contained below.

From the nineteenth day of the Convention, the Report of the Committee on Education proposed the following provision:

ARTICLE VII

EDUCATION

> Sec. 1. SUPPORT OF FREE PUBLIC SCHOOLS. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, the legislature shall provide for a system of free public schools through the secondary level that will furnish each individual equal educational opportunity.
>
> In distributing state support of the free public schools, the legislature shall ensure that the quality of education made available shall not be based on wealth other than the wealth of the state as a whole.

1974 Journals (Vol. 1) at 266.

In the section-by-section analysis and comments section, the Committee on Education noted how the proposed art. VII, §1 differed from our present art. VII, §1. The report noted:

> Two areas in which the committee report and Constitutional Revision Commission proposal agree, but vary substantially from the Constitution of 1876 are:
>
> 1. the reference to furnishing equal educational opportunity to each individual in the free public school system;
>
> 2. the provision requiring the legislature to ensure that the quality of education made available in the free public school system be based on the wealth of the state as a whole.
>
> Equal educational opportunity is assured by requiring the state to guarantee that the quality of a person's education be dependent on the wealth of the state as a whole, rather than the tax resources of the local school districts. The inclusion of this provision results primarily from two elements which contribute greatly to the inequities in public school financing: (a) disparities in local spending per pupil caused by the differences in taxable wealth of school districts, and (b) the failure of the Minimum School Foundation Program to compensate for the differences in the taxable wealth of school districts. There is no intent in the language proposed by the committee to prohibit local enrichment by individual school districts.

1974 Journals (Vol. 1) at 268.

The report also stated:

> Incorporation of the clause "equal educational opportunity" was consistent with the committee and Constitutional Revision Commission's belief that the legislature should be required to correct the inequity of educational opportunity as discussed in decisions by both the three-judge federal court and the Supreme Court of the United States (see San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)). [Emphasis added].

1974 Journals (Vol. 1) at 268.

Observe the language -- "... belief that the legislature should be required to correct the inequity ..." Apparently, the Committee on Education felt that a new art. VII, §1 could require the Texas school financing system to contain those elements that the trial court held the present system requires, but that the present art. VII, §1 did not allude to, suggest, or remotely infer, the "equal educational opportunity" that Petitioners assert art. VII, §1 guarantees them.

From the twenty-first day of the 1974 Texas Constitutional Convention Debates; Delegate Kubiak, discussing the Committee on Education's proposed art. VII, §1; stated:

> The intent of Section 1 is to provide each child that is in the secondary level or below with an equal educational opportunity whether he lives in Edgewood or whether he lives in Rocksdale, or Asherton, or any other place in this state. We should guarantee the children of this state some commitment to provide the best education that we possibly can. This language is not trying to solve public school finance or anything else. Only the legislature can solve any language along that line, and we didn't intend to do that. We think this is moderate language to our commitment. [Emphasis added.]

1974 Debates (Vol. 1) at 135.

On the twenty-first day of the Convention, Delegate Hightower, a member of the Education Committee, discussed art. VII, §1 in both its present form, and in its proposed form. Specifically, Delegate Hightower noted that "efficient" was not equivalent to "equitable." Said Delegate Hightower:

> Mr. President and my fellow delegates. Section 1 can probably be described three

> ways as having perhaps three purposes. First of all, it could be described as a preamble to the whole section and it is that. It could be described as a statement of principle for the entire section and it is that. Or, it can be described as a mandate to the legislature to provide for the support of the public schools, and we believe that it is that also. There was more discussion on Section 1 than any other part of the whole Education Article. I think we spent the best part of three weeks in hearing the arguments pro and con the support of free public schools. At first blush there does not appear to be that much that would be controversial. Section 1 of the existing constitution, the constitution of 1876, provides for the support and maintenance of an efficient system of public free schools. The adjective that was used was "efficient." The word "efficient" does not appear in Section 1 of this article that we are presenting to you today. We provide for the equitable support of free public schools. The main argument, the main strength of the proposal, centered around three words. They are found in the first paragraph where it says 'equal educational opportunity'. [Emphasis added].

1974 Debates (Vol 1) at 136.

Common sense tells us that the replacement of the word "efficient" by the word "equitable" was brought about by the consensus that "efficient," in neither the current Constitution nor in the proposed constitution under discussion, envisioned or mandated an equitable or elaborate system of public school finance. Otherwise, the additional words "equitable" and "equal educational opportunity" would not be needed. It is clear, therefore, that in order to achieve a wealth-based concept of "equal educational opportunity," the current Constitution would have to be amended.

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On the twenty-third day of the Convention, Delegate Mauzy, in arguing against a "goal" of equal educational opportunity offered by Delegate Barnhart, discussed the merits of his proposed art. VII, §1, which would guarantee an equal educational opportunity. Said Delegate Mauzy:

> Mr. President and delegates. We're in a very strange parliamentary situation. Mr. Washington and I have an amendment that's coming up next if this Barnhart Substitute is defeated. There's only one difference between the Barnhart proposal and the Washington-Mauzy proposal. That's in this language. We say that, "The legislature must provide for equitable support and maintenance of an efficient system of free public schools below the college level, that will furnish each individual equal education". . . . What we really come down to is whether we're going to say in this constitution to every legislature in the future, "You will furnish each individual an equal educational opportunity." If you agree with me that we should do that, that indeed we must do that, then I urge you to vote no on the Barnhart proposal so we can then get to the Washington-Mauzy proposal. Thank you.

1974 Debates (Vol 1) at 192.

The Chair then recognized Delegate Hightower for the purpose of speaking in favor of the Barnhart "goal" compromise:

> Mr. President and my fellow delegates. In all of this debate we seem to be hung up on the phrase "equal educational opportunity." Certainly this should come as no surprise to the members of the committee who spent the better part of three weeks talking about it. I want to say frankly, that in the beginning I finally came around to the equal educational opportunity terminology for this reason. When we understand, first of all, that we're talking about opportunity, that

the emphasis should be there, it has a slightly different meaning. But still, so many people, and even today on the floor of this chamber, are concerned about the word "equal," because they are accustomed to thinking of the word "equal" in its scientific definition, in its scientific application. Certainly we know that you cannot make two things equal unless you're using a Xerox machine. We're not talking about equality in the sense that everything has to be exactly the same. That's the reason we can identify people with fingerprints. No two are alike. No two people are alike; no two sets of circumstances are alike.

Certainly the school needs in one part of the state cannot be duplicated exactly in another part of the state. For those who fear the terminology "equal educational opportunity" with the idea that it would require that every school district have exactly the same course offering, exactly the same size school, exactly the same number of students, and the same number of teachers, if that's what their fear is in "equal," then we think that by changing the words to say, "provide a goal of," that this is the social application of the word "equal;" that we should strive for "equality," knowing that we're never going to find it exactly, that it cannot be exactly attained, that it's impossible to duplicate school districts, school offerings, school programs any more than you can duplicate the teachers, the students, the same circumstances in every place.

By putting in what we really mean and what we understand the meaning of the word to be, that it is an ideal, that we're talking idealistically, and as we seek that goal, to call it a "goal." If we understand that "equal" means that we're going to try to provide equality, then when you put the word "try" in there, you really use the word in the sense of a goal. If we're going to try to achieve equality of opportunity, if that is what we're going to try to do, well then, we're saying it. Because some people could not take the phrase without adding in their own minds the fact that it was going to cause a lot of problems of trying to

> achieve scientifically equality, or could not accept it as an idealistic goal, then we have added the word "goal." That's the basis of our compromise. [Emphasis added.]

1974 Debates (Vol 1) at 192.

The conclusion to be drawn is that the delegates did not equate "efficient" with "equitable", "equal", or any elaborate or extravagant system of public school financing. The delegates of the 1974 Debates, like the delegates of the 1875 Debates, correctly understood that an "efficient system of public free schools" was a limited concept, restrictive in scope, and never intended as an affirmative grant of individual rights or broad-sweeping legislative duties.

The proposed 1976 Revision of the Texas Constitution, submitted to the voters on November 4, 1975, contained the following language for Art. VII, §1:

> Section 1. Equitable Support of Free Public Schools. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, the legislature has the duty to establish and provide by law for the equitable support and maintenance of an efficient system of free public schools below the college level. The system must furnish each individual an equal educational opportunity, but a school district may provide local enrichment of educational programs exceeding the level provided by the state consistent with general law.

1974 Journals (Vol 2) at 1940.

The proposed amendment, which would have provided for "equitable support" and "equal educational opportunity", was defeated by the voters. Respondent respectfully urges the

court to interpret art. VII, §1 as the framers in 1875 interpreted it, as the delegates in 1974 interpreted it, and as the court of appeals correctly interpreted it -- as a requirement for an "efficient" system, but not an "equitable" or "equal" system. The very fact that the records of the 1974 Constitutional Convention contain hundreds of pages of debates on this very subject lends credence to a determination that the school funding system is inherently a political one, not readily susceptible to judicial review.

C. The court of appeals was correct in failing to find the Texas school finance system in violation of the efficiency clause of the Texas Constitution, art. VII, §1.

The trial court declared the Texas school financing system, Tex. Educ. Code §16.001, et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education, unconstitutional because, among other things, it was not an efficient system of free public schools as required by art. VII, §1. The trial court defined an efficient system as a "cost-efficient/non-wasteful system of public free schools." (Tr. 601).

The court of appeals held that the question of what is, or is not, efficient was a political question not subject to judicial review. The court of appeals was correct in this determination. [Respondents' Brief submitted by the State of Texas, et al., contains authority on the proper role of the court and the legislature.] In the event, however, that this

Court determines that the efficiency issue is subject to judicial review, such review should conclude that the school financing system is efficient as required by art. VII §1.

Only one witness, Dr. Walker, testified as to the history of education and school finance in Texas. (SF 1917-2184). Dr. Walker was called by Petitioners and his expertise in the field of the history of education and school finance was stipulated to by Respondents. (SF 1917-1918). Dr. Walker's testimony on Texas constitutional history directly supports a finding that the trial court erred as a matter of law in its determination of the meaning of "efficient" as understood by the framers of our Texas Constitution. (SF 1986, 2043-44, 2051-52, 2062-63).

Additionally, Dr. Walker's testimony established that the trial court's "facts demonstrating that the Texas school finance system does not meet its obligations under Tex. Const. Art. 7, §1" (Tr. 601-603) are irrelevant facts with respect to art. VII, §1 in that the framers of the Texas Constitution never envisioned or intended the scope and purpose of art. VII, §1 to address such matters. (SF 2041-44, 2046-48, 2051-52, 2062-67, 2075-76, 2085). Therefore, the factual findings of the trial court (Tr. 601-603) are both legally and factually insufficient to support the trial court's holding regarding the "efficiency" of the Texas school financing system. (Tr. 603).

By failing to properly apply and follow the canons of constitutional interpretation and construction to art. VII, §1 and by failing to properly define the scope and requirements of

art. VII, §1 in light of the historical development of education in Texas, the trial court also erred in its findings as a matter of law.

The term most basic to this case and in need of definition is, of course, "efficient." Three traditional methods of determining the judicial definition of a word used in a statute or constitution and not specifically defined in them are:

1. Pronouncements by courts;
2. Definitions inferrable from debates and proceedings of the bodies that drew the documents; and
3. Reliable extra-judicial commentary.

In the case at bar, Petitioners' protestations to the contrary notwithstanding, no Texas court has defined "efficient" as used in art. VII, §1. Therefore, there is no direct authority to aid the court. Petitioners assert, however, that two Texas cases have addressed the term "efficient" and have linked the term with "equality." See Petitioner-Intervenors' Brief at 17-18, 34, 46. While both of the cases to which Petitioners refer, Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31 (1931) and Watson v. Sabine Royalty, 120 S.W.2d 938 (Tex.Civ.App.--Texarkana 1938, writ ref'd), do imply that increasing the state funding to property poor school districts will tend to equalize educational opportunities and make the system "more efficient," this is a far cry from a

holding that "efficiency" and "equality" are linked to a sufficient extent to support the proposition that a system which is not equal is not efficient. Indeed, Mumme and Watson suggest that the systems under review, while not equal, were efficient at that time. Mumme and Watson hold that more money can make the system more equal and therefore more efficient. Implicit in that finding, however, is that the system was at least efficient to begin with.

Petitioners also urge that the Texas school financing system violates art. VII, §1 based upon other states' interpretations of the phrase "thorough and efficient" in their constitution's respective school establishment clauses. See Petitioners' Brief at 62; Petitioner-Intervenors' Brief at 19. Every state constitution, however, has its own individual and distinct history; and every school establishment provision must be judged in light of its unique constitutional history and original framer's intent.

Indeed, the same "thorough and efficient" phrase which both the trial court and Petitioners rely upon to bolster their findings that the Texas school financing system is not efficient has been upheld in other states' constitutions. The Illinois Constitution provides for a "thorough and efficient system of free schools" in its art. VIII, §1. In McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1969), this system was held to be constitutional.

Based upon their respective "thorough and efficient" clauses, the Supreme Courts of Pennsylvania, Danson v. Carey, 382 A.2d 1238 (Pa. 1978); and Maryland, Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983), found their respective school finance systems constitutional. In Burruss v. Wilkerson, 310 F.2d 572 (W.D. Va. 1969), the Virginia Constitutional provision requiring "an efficient system of public free schools" was applied to the Virginia system of school finance. The court upheld the constitutionality of the school finance system. Burruss at 574.

Obviously, the wording in a particular state's school establishment clause cannot be determinative of the meaning of "efficient" as it was envisioned by the framers of art. VII, §1 of our Texas Constitution. Only by observing the original intent of the drafters of art. VII, §1, and the voters who adopted it, can we determine the intended impact of art. VII, §1.

As previously noted, the Constitutional Convention of 1875 historically established that the word "efficient" was deliberately introduced into art. VII, §1 to restrict the legislature from creating an elaborate or expensive system of public schools. "Efficient" was used to negate any conception that a "magnificent" or "eloquent" school system was envisioned by the drafters of the 1876 Constitution. Supra at pp. 12-15.

Also noted was the prevailing sentiment at the Constitutional Convention of 1875 of the poverty of the state

and the fear of additional taxes. (See Walker at SF 2062-63, 2130-31). A significant portion of the delegates to the Convention felt that taxes for public schools was an unnecessary tax. As a compromise to those delegates who wanted State funded public schools of the highest quality, however, those delegates opposing taxes for schools agreed to school taxes, but only for an efficient system of public free schools, not for an elaborate and expensive system. Supra at pp. 16-18.

Turning to extra-judicial scholarly commentary on the use of the word "efficient" in art. VII, §1, the commentators agree that "efficient" is not a grant of a certain level of quality, but is a restriction on the level of quality and implied tax burden that the state may provide. Supra at pp. 14-15.

The scholarly commentary directly supports the conclusion that "efficient" was included in art. VII, §1 to restrain elaborate spending on education, not to encourage or require it. Therefore, the trial court's finding that an efficient system requires a certain output that is "cost-efficient" and "non-wasteful" (Tr. 601) was erroneous as a matter of law. Because of the current input into the system by the State, the Texas school financing system is, at the very least, an "efficient system of public free schools" as envisioned by the framers of art. VII, §1.

Nothing in art. VII, §1 suggests that the framers of the Constitution of 1876, or the people who adopted it, intended to make the "right to education" anything more than a moral

directive to the legislature. As noted by one commentator after reviewing art. VII, §1 and its historical development:

> Public education is not considered a "core" or fundamental element in a state constitution, but the command to educate children is a generally accepted "good government" provision . . . . this constitutional expression is largely hortatory, reflecting a desire to give some direction and moral guidance in an area deemed preeminently important to the public welfare.

Braden at 508.

While art. VII, §1 contains an expression of the desire of the framers to support public education, it does not create a fundamental right to education, or to an elaborate system of education, or to any rights other than to an "efficient system of public free schools." And an "efficient system" is that system that the Constitution has given the legislature the discretion to define through the State Board of Education's Curriculum requirements, textbook requirements, accreditation requirements, and TEAMS test results. [Respondents Brief submitted by the State of Texas, et al., contains a full scale discussion of the educational entitlement under art. VII, §1].

Texas is part of the great American tradition of supporting the education of its children. But from 1875 to the present, Texas constitutional history has equally been one of frugality and of resistance to excessive taxation. (See Walker at SF 2061-63, 2076, 2130-31). Historically, Texas has never accepted the philosophy of "tax and tax and spend and spend". Together, these two constitutional commands instruct the

legislature to promote education for all Texas children but not to go overboard in spending money.

It seems apparent that one cannot read art. VII, §1 to command the legislature to levy taxes to the extent necessary to give every child the best education available. The most that art. VII, §1 calls for is that the state must make a reasonable effort to provide for education. While it could have been argued at the time of Rodriguez that, in the words of Justice Stewart, the "chaotic and unjust" system of education in Texas was a violation of the command of art. VII, §1, the broad-sweeping changes in 1975, 1979, and 1984 of the Texas Education Code ended any "unreasonableness" that might have existed at the time of Rodriguez. (See Walker at SF 2177).

Indeed, historically, from the time of the State's inception through its most recent enactment of educational reforms under H.B. 72 the Texas Legislature has consistently acted with both the intent and the effect of improving the quality of education in the State for all students. The Texas school financing system provides each school district with an equalized ability to raise and spend an amount of money necessary to provide a basic and adequate educational opportunity to each student within the district.

In short, the Texas school financing system constitutes "an efficient system of free schools" and, therefore, does not violate art. VII, §1 of the Texas Constitution. The duty of the legislature to provide for the "support and maintenance of

an efficient system of public free schools" under the aforementioned article does not require the legislature to provide for the support and maintenance of every course or program that an educator might devise or that a school district might desire to implement. Rather, the legislature's only charge is to provide a basic educational opportunity for each student. The Texas Legislature has done this.

D. The Texas school finance system is authorized by Tex. Const. art. VII, §3.

1. An Overview.

Throughout the trial court's findings, one common theme emerged: The Texas school financing system violates the Texas Constitution. Throughout the trial court's findings, one fatal flaw of the common theme also emerged: The Texas Constitution expressly authorizes the essential elements of the challenged system.

To assert that a system, authorized by a state constitution, violates the Federal Constitution, is one thing; to assert that that same system violates the state constitution that created it, is quite another thing. The court of appeals was correct in holding that the present system of school finance is authorized by art. VII, §3 of the Texas Constitution ("art. VII, §3").

Art. VII, §1 provides the legislature authority to set up a public school system. Art. VII, §3 sets up the means of financing that system through state support and local support.

The trial court's holding, in its simplest terms, is that the system authorized by art. VII, §§ 1 and 3 violates the Texas Constitution. The fatal flaw of this conclusion is that the same Texas Constitution which generally extends equal protection and an efficient school system also specifically authorizes the essential elements of the Texas school financing system.

As a matter of constitutional interpretative principle, the authority which the Constitution specifically extends with one hand cannot be generally withdrawn with the other. Both state aid to education, and local aid to education are authorized by art. VII, §3. Art. VII, §3 constitutionally authorizes a system whereby the levy of taxes on property within school districts, supplemented by state aid, constitutes the source of school financing. (See Walker at SF 2077-78, 2119, 2154).

We must presume that the framers of the Constitution were fully aware of the fact that there would be disparities in school district wealth and that the effect of local enrichment would result in substantial spending imbalances between school districts. The existence of art. XI, §10 of the Texas Constitution ("art XI, §10"), as discussed infra, supports this presumption. The key point, however, is that this wealth disparity is constitutionally authorized. Any unequitable or sociologically undesirable consequences of disparities in school district wealth are not constitutionally implicated;

they are matters for legislative correction, not judicial determination.

As local enrichment of school districts through local property taxes is authorized by art. VII, §3, and as both art. VII, §1 and art. VII, §3 envision and authorize a system of school financing based upon local support and state support, the system just described cannot violate the equal protection guarantees of the same constitution. A system created by the constitution is clearly constitutional under that constitution. The logic is too simple to deny.

Regardless of how Petitioners attempt to present their arguments, the reality of the situation is that the trial court held that our Texas Constitution invalidates a historically well implemented system of public school financing created and envisioned by the drafters of that same Texas Constitution. The court of appeals correctly reversed this clearly erroneous holding.

2. Historical Analysis.

The court of appeals correctly determined that the Texas school finance system, when viewed in light of Texas history, constitutional interpretive principals, and amendments to the Constitution, is authorized by art. VII, §3. Art. VII, §3 provides as follows:

> One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in

addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace part of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools or such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

Art. XI, §10, which allowed city run school districts, provided as follows:

> The Legislature may constitute any city or town a separate and independent school district. And when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institution of learning, such tax may hereafter be levied and collected, if at an election, held for that purpose, two thirds of the taxpayers of such city or town shall vote for such tax.

Art. VII, §3 was adopted in 1876 and has been amended six times since its adoption. Art. XI, §10 was adopted in 1876 and repealed in 1969. Art. VII, §3, as originally adopted in 1876, read:

> There shall be set apart annually not more than one-fourth of the general revenue of the State and a poll tax of $1.00 on all male inhabitants in this State between the ages of twenty-one and sixty years, for the benefit of public free schools.

The purpose of art. VII, §3, as originally adopted, was to restrict the legislature from appropriating any more State revenues for education greater than those funds authorized by art. VII, §3.

Historically, prior to the Civil War, municipalities in Texas ran their own educational programs through the use of city schools. Legislatively chartered cities, such as Dallas, Fort Worth and Houston, were empowered to run their own educational affairs, including the right to vote taxes for school purposes. See 1 Gammel's Laws of Texas 1436. During the Civil War, and shortly thereafter, city schools diminished

and education was placed under the control of State government under the Reconstruction Constitution. Art. XI, §10 was principally adopted as a reaction to the State controlled educational systems imposed during the Civil War, and as authority for cities to tax an additional tax for education not subject to the taxing limitations for cities of art. XI, §5. Art. XI, §10 merely reaffirmed the practice of municipal control of schools, and provided that the legislature might constitute any city or town an independent school district. Art. XI, §10 allowed unlimited taxation if two thirds of the taxpayers approved, subject only to limits imposed by the legislature.

In 1882, the Texas Supreme Court in City of Fort Worth v. Davis, 57 Tex. 225 (1882), held that art. VII, §3 did not authorize the levy of additional taxes for public schools not expressly authorized by art. VII, §3. The court excepted from its holding a city or town that constituted a separate school district under art. XI, §10 of the Texas Constitution, which allowed those cities and towns to levy unlimited taxes if approved by a two-thirds vote of the taxpayers.

In response to the Davis opinion, art. VII, §3 was amended in 1883. The 1883 amendment eliminated the limitation on educational funding of one-fourth of the general revenue and replaced it with a dedication to education of one-fourth of the revenue derived from State occupation taxes. The 1883 amendment retained the poll tax, created a statewide ad valorem

tax for education not to exceed 20¢ per $100.00 valuation, granted the legislature the power to create school districts by general or special law, and granted those school districts local ad valorem taxation powers of 20¢ per $100.00 valuation upon approval by two-thirds of the voters. The 20¢ per $100.00 valuation tax limit did not, however, apply to City independent school districts created under art. XI, §10.

In 1908, art. VII, §3 was amended to increase the maximum local ad valorem tax from 20¢ per $100.00 valuation to 50¢ per $100.00 valuation, and to reduce the vote required to authorize the tax from two-thirds to a majority. In 1909, art. VII, §3 was again amended in response to the Texas Supreme Court's decision in Parks v. West, 102 Tex. 11, 111 S.W. 726 (1909) which held that the words "within all or any of the counties" contained in art. VII, §3 did not permit school districts to cross county lines. The 1909 amendment removed the perceived limitation that school districts must be located wholly within one county.

In 1918, art. VII, §3 was amended to increase the mandated State ad valorem tax from 20¢ per $100.00 valuation to 35¢ per $100.00 valuation. The 1918 amendment also authorized the legislature to spend general revenue monies to meet educational needs and, and for the first time, allowed money to go directly to school districts, and not the permanent school fund set up under art. VII, §5. In 1920, art. VII, §3 was amended in order to shift a greater portion of the burden of

financing education to local school districts to the extent that local school districts would accept that burden through local tax elections. Thus, the limited taxation of 50¢ per $100.00 valuation that local school districts could levy was abolished and the legislature was given the power to set taxing limits. In 1926, the present version of art. VII, §3 was adopted. The 1926 amendment eliminated the legislature's power to create school districts by special law. In 1963, the Texas Supreme Court in Shepard v. San Jacinto Junior College District, 363 S.W.2d 742 (Tex. 1963) interpreted art. VII, §3 to include junior college districts within the meaning of "school districts" so as to authorize junior colleges to collect local ad valorem taxes.

3. Conclusions.

In applying constitutional principals of interpretation to art. VII, §3, certain conclusions arise. Giving effect to the intent of the framers of the Texas Constitution, and the voters who adopted it, since the 1883 amendment to art. VII, §3, the school funding scheme in Texas has been a shared system, composed of the State and its political subdivisions, the school districts. Under art. VII, §3, "school districts" include common school districts, independent school districts, municipal school districts and junior college school districts.

Art. VII, §3 constitutionally authorizes a system whereby the levy of taxes on local property within the school districts, in addition to State funds, constitutes the source

of public school financing in Texas. To the extent, however, that local funds, through local ad valorem taxes, are employed in the funding of education, such use is expressly and constitutionally made optional at the discretion of the voters in local school districts. The voters are expressly and constitutionally authorized to permit the levy of large taxes, small taxes or no taxes for the support of the school district.

There is not a single implication in art. VII, §3, or in any other constitutional provision, that would mandate that the taxable wealth in each school district, which includes junior college districts, be the same as the wealth in each other district, or that local taxes be levied and collected at all, such matters being expressly left within the discretion of the voters of each local school district. Construing art. VII, §1 and art. VII, §3 together, and harmonizing such sections, the Texas school financing system, based upon optional local support and mandatory State support, does not violate art. VII, §1's "efficiency" mandate, and does not violate the equal protection guarantees of art. I, §3 of the Texas Constitution because the express provisions of a constitutional section cannot possibly be held to violate the general provisions of another constitutional section.

Art. XI, §10, although repealed in 1969, when adopted in 1876 evinced the importance of local control that the founders of our Constitution believed to be of paramount importance to the role of education in the State of Texas. Art. XI, §10

further evinces the intent of our Constitutional framers to constitutionally allow local enrichment by school districts through the use of ad valorem taxation without any limitation other than the approval of the taxpayers, and limits imposed by the legislature.

As art. XI, §10 allowed cities of varying property wealth to constitute school districts, and did not limit the amount of local funds which could be raised by the city school districts, it is apparent the framers of the Constitution, and the voters who approved it, intended to create a system of school finance which allowed unequal property tax wealth between school districts. The unequal property tax wealth was considered constitutional, and a constitutional provision requiring the State to equalize the inequality through additional State funds was neither proposed, nor adopted -- a measure that could have been taken if the intent of the framers and the people was to insure equal property tax wealth in all school districts.

Construing and harmonizing art. XI, §10 with art. VII, §1 and the equal protection provisions of the Texas Constitution, it is apparent that the people did not intend for local school district control, which includes the power to tax or not to tax, and local school district enrichment through the use of ad valorem property taxes, to violate the "efficiency" provisions of art. VII, §1 or the equal protection doctrine contained in art. I, §3 of the Texas Constitution.

In reviewing art. VII, §1, art. VII, §3, art. XI, §10, and art. I, §3 in terms of the constitutionality of the school funding scheme, and giving due consideration to the established rules of constitutional construction, the intent of the framers of the Texas Constitution, and the people who approved same, was to establish a system of educational funding whereby the State, through constitutionally mandated funds set out principally in art. VII, §§3 and 5, through additional State funds to be appropriated by the legislature at the legislature's sole discretion, and through local property taxes levied by school districts at their sole discretion, constituted a constitutionally permissible system that provides an efficient system of free public schools, and that provides the equal protection of the law to all public school students. This original intent is supported by a review of history, the conditions which existed at the time of the adoption of the Constitution, and the general spirit and sentiments of the time.

Construing the Constitution's provisions together, and harmonizing them, the present system of public school financing is constitutional and not violative of art. I, §3, art. VII, §1 or any other provision of the Texas Constitution. If harmony were not possible, then the specific system of school funding authorized by art. VII, §3, and evinced by art. XI, §10, controls the more general provisions of art. I, §3, and art. VII, §1. The more general provisions governing "equal protection" and "efficiency" must yield to the specific

provisions which authorize the current system of public school finance.

The current system of public school finance, acquiesced in by the people and long continued for over 100 years, is entitled to great weight by this Court; this Court cannot question the wisdom of the Texas Constitution, and it must give full effect to the intent of the framers of the Constitution, as the court of appeals correctly observed.

The Texas school finance system is constitutional in all respects, in that neither art. I, §3, art. VII, §1, art. VII, §3, art. XI, §10, nor any other provision of the Constitution, is violated by the Texas school finance system.

REPLY POINT NO. 4

THE COURT OF APPEALS PROPERLY ASSESSED THE ROLE OF THE INDEPENDENT SCHOOL DISTRICTS WITHIN THE CONSTITUTIONAL FRAMEWORK UNDER THE TEXAS SCHOOL FINANCE SYSTEM

See Brief of Respondents Andrews Independent School District, et al., with respect to Reply Point No. 4.

PRAYER FOR RELIEF

WHEREFORE, for the reasons stated, and for the reasons set out in the other Respondents' Briefs in this cause, Respondent, IISD, respectfully requests that this Honorable Court refuse the applications for writ of error, or alternatively if such applications are granted, that the judgment of the court of appeals be affirmed in its entirety.

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Respondent further requests any and all such other relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief has been served upon the following counsel of record on this 24th day of February, 1989.

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C 8353

NO. C-8353

IN THE

Supreme Court of Texas

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners

v.

WILLIAM KIRBY, *et al.*,

Respondents

BRIEF OF RESPONDENTS EANES INDEPENDENT SCHOOL DISTRICT, *ET AL.*, IN RESPONSE TO PETITIONERS' AND PETITIONER-INTERVENORS' APPLICATIONS FOR WRIT OF ERROR

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NAMES OF ALL PARTIES

In order that members of the Court may determine disqualification or recusal pursuant to Texas Rule of Appellate Procedure 131(a), Respondents Eanes Independent School District, *et al.*, certify that the following is a complete list of the parties and persons interested in the outcome of this case:

(1) William N. Kirby, Interim State Commissioner of Education, Respondent
(2) Texas State Board of Education, Respondent
(3) Bill Clements, Governor and Chief Executive Officer of the State of Texas, Respondent
(4) Robert Bullock, State Comptroller of Public Accounts, Respondent
(5) State of Texas, Respondent
(6) Jim Mattox, Attorney General of Texas, Respondent
(7) Andrews Independent School District, Respondent
(8) Arlington Independent School District, Respondent
(9) Austwell Tivoli Independent School District, Respondent
(10) Beckville Independent School District, Respondent
(11) Carrollton-Farmers Branch Independent School District, Respondent
(12) Carthage Independent School District, Respondent
(13) Cleburne Independent School District, Respondent
(14) Coppell Independent School District, Respondent
(15) Crowley Independent School District, Respondent
(16) DeSoto Independent School District, Respondent
(17) Duncanville Independent School District, Respondent
(18) Eagle Mountain-Saginaw Independent School District, Respondent
(19) Eanes Independent School District, Respondent
(20) Eustace Independent School District, Respondent
(21) Glasscock County Independent School District, Respondent
(22) Grady Independent School District, Respondent
(23) Grand Prairie Independent School District, Respondent
(24) Grapevine-Colleyville Independent School District, Respondent
(25) Hardin Jefferson Independent School District, Respondent
(26) Hawkins Independent School District, Respondent
(27) Highland Park Independent School District, Respondent
(28) Hurst Euless Bedford Independent School District, Respondent
(29) Iraan-Sheffield Independent School District, Respondent
(30) Irving Independent School District, Respondent
(31) Klondike Independent School District, Respondent
(32) Lago Vista Independent School District, Respondent
(33) Lake Travis Independent School District, Respondent
(34) Lancaster Independent School District, Respondent
(35) Longview Independent School District, Respondent
(36) Mansfield Independent School District, Respondent
(37) McMullen Independent School District, Respondent
(38) Miami Independent School District, Respondent
(39) Midway Independent School District, Respondent
(40) Mirando City Independent School District, Respondent
(41) Northwest Independent School District, Respondent
(42) Pinetree Independent School District, Respondent

(43) Plano Independent School District, Respondent
(44) Prosper Independent School District, Respondent
(45) Quitman Independent School District, Respondent
(46) Rains Independent School District, Respondent
(47) Rankin Independent School District, Respondent
(48) Richardson Independent School District, Respondent
(49) Riviera Independent School District, Respondent
(50) Rockdale Independent School District, Respondent
(51) Sheldon Independent School District, Respondent
(52) Stanton Independent School District, Respondent
(53) Sunnyvale Independent School District, Respondent
(54) Willis Independent School District, Respondent
(55) Wink-Loving Independent School District, Respondent
(56) Edgewood Independent School District, Petitioner
(57) Socorro Independent School District, Petitioner
(58) Eagle Pass Independent School District, Petitioner
(59) Brownsville Independent School District, Petitioner
(60) San Elizario Independent School District, Petitioner
(61) South San Antonio Independent School District, Petitioner
(62) Pharr-San Juan-Alamo Independent School District, Petitioner
(63) Kenedy Independent School District, Petitioner
(64) La Vega Independent School District, Petitioner
(65) Milano Independent School District, Petitioner
(66) Harlandale Independent Schools District, Petitioner
(67) North Forest Independent School District, Petitioner
(68) Aniceto Alonzo, on his own behalf and as next friend of his children Santos Alonzo, Hermelinda Alonzo and Jesus Alonzo, Petitioner
(69) Shirley Anderson, on her own behalf and as next friend of her child Derrick Price, Petitioner
(70) Juanita Arredondo, on her own behalf and as next friend of her children Augustin Arredondo, Jr., Nora Arredondo and Sylvia Arredondo, Petitioner
(71) Mary Cantu, on her own behalf and as next friend of her children Jose Cantu, Jesus Cantu and Tonitius Cantu, Petitioner
(72) Josefina Castillo, on her own behalf and as next friend of her child Mareno Coreno, Petitioner
(73) Eva W. Delgado, on her own behalf and as next friend of her child Omar Delgado, Petitioner
(74) Ramona Diaz, on her own behalf and as next friend of her children Manuel Diaz and Norma Diaz, Petitioner
(75) Anita Gandara and Jose Gandara, Jr., on their own behalf and as next friends of their children Lorraine Gandara and Jose Gandara, III, Petitioners
(76) Nicolas Garcia, on his own behalf and as next friend of his children Nicolas Garcia, Jr., Rodolfo Garcia, Rolando Garcia, Graciela Garcia, Criselda Garcia and Rigoberto Garcia, Petitioner
(77) Raquel Garcia, on her own behalf and as next friend of her children Frank Garcia, Jr., Roberto Garcia, Ricardo Garcia, Roxanne Garcia and Rene Garcia, Petitioner
(78) Hermelinda C. Gonzalez, on her own behalf and as next friend of her child Angelica Maria Gonzalez, Petitioner
(79) Ricardo Molina, on his own behalf and as next friend of his child Job Fernando Molina, Petitioner
(80) Opal Mayo, on her own behalf and as next friend of her children John Mayo, Scott Mayo and Rebecca Mayo, Petitioner
(81) Hilda Ortiz, on her own behalf and as next friend of her child Juan Gabriel Ortiz, Petitioner

(82) Rudy C. Ortiz, on his own behalf and as next friend of his children Michelle Ortiz, Eric Ortiz and Elizabeth Ortiz, Petitioner
(83) Estela Padilla and Carlos Padilla, on their own behalf and as next friends of their child Gabriel Padilla, Petitioners
(84) Adolfo Patino, on his own behalf and as next friend of his child Adolfo Patino, Jr., Petitioner
(85) Antonio Y. Pina, on his own behalf and as next friend of his children Antonio Pina, Jr., Alma Pina and Anna Pina, Petitioner
(86) Reymundo Perez, on his own behalf and as next friend of his children Ruben Perez, Reymundo Perez, Jr., Monica Perez, Raquel Perez, Rogelio Perez, and Ricardo Perez, Petitioner
(87) Patricia A. Priest, on her own behalf and as next friend of her children Alvin Priest, Stanley Priest, Carolyn Priest and Marsha Priest, Petitioner
(88) Demetrio Rodriguez, on his own behalf and as next friend of his children Patricia Rodriguez and James Rodriguez, Petitioner
(89) Lorenzo G. Solis, on his own behalf and as next friend of his children Javier Solis and Cynthia Solis, Petitioner
(90) Jose A. Villalon, on his own behalf and as next friend of his children Ruben Villalon, Rene Villalon, Maria Christina Villalon and Jaime Villalon, Petitioner
(91) Alvarado Independent School District, Petitioner
(92) Blanket Independent School District, Petitioner
(93) Burleson Independent School District, Petitioner
(94) Canutillo Independent School District, Petitioner
(95) Chilton Independent School District, Petitioner
(96) Copperas Cove Independent School District, Petitioner
(97) Covington Independent School District, Petitioner
(98) Crawford Independent School District, Petitioner
(99) Crystal City Independent School District, Petitioner
(100) Early Independent School District, Petitioner
(101) Edcouch-Elsa Independent School District, Petitioner
(102) Evant Independent School District, Petitioner
(103) Fabens Independent School District, Petitioner
(104) Farwell Independent School District, Petitioner
(105) Godley Independent School District, Petitioner
(106) Goldthwaite Independent School District, Petitioner
(107) Grandview Independent School District, Petitioner
(108) Hico Independent School District, Petitioner
(109) Jim Hogg County Independent School District, Petitioner
(110) Hutto Independent School District, Petitioner
(111) Jarrell Independent School District, Petitioner
(112) Jonesboro Independent School District, Petitioner
(113) Karnes City Independent School District, Petitioner
(114) La Feria Independent School District, Petitioner
(115) La Joya Independent School District, Petitioner
(116) Lampasas Independent School District, Petitioner
(117) Lasara Independent School District, Petitioner
(118) Lockhart Independent School District, Petitioner
(119) Los Fresnos Consolidated Independent School District, Petitioner
(120) Lyford Independent School District, Petitioner
(121) Lytle Independent School District, Petitioner
(122) Mart Independent School District, Petitioner
(123) Mercedes Independent School District, Petitioner
(124) Meridian Independent School District, Petitioner
(125) Mission Independent School District, Petitioner

(126) Navasota Independent School District, Petitioner
(127) Odem-Edroy Independent School District, Petitioner
(128) Palmer Independent School District, Petitioner
(129) Princeton Independent School District, Petitioner
(130) Progresso Independent School District, Petitioner
(131) Rio Grande City Independent School District, Petitioner
(132) Roma Independent School District, Petitioner
(133) Rosebud-Lott Independent School District, Petitioner
(134) San Antonio Independent School District, Petitioner
(135) San Saba Independent School District, Petitioner
(136) Santa Maria Independent School District, Petitioner
(137) Santa Rosa Independent School District, Petitioner
(138) Shallowater Independent School District, Petitioner
(139) Southside Independent School District, Petitioner
(140) Star Independent School District, Petitioner
(141) Stockdale Independent School District, Petitioner
(142) Trenton Independent School District, Petitioner
(143) Venus Independent School District, Petitioner
(144) Weatherford Independent School District, Petitioner
(145) Ysleta Independent School District, Petitioner
(146) Connie DeMarse, on her own behalf and as next friend of her children Bill DeMarse and Chad DeMarse, Petitioner
(147) B. Halbert, on his own behalf and as next friend of his child Elizabeth Halbert, Petitioner
(148) Libby Lancaster, on her own behalf and as next friend of her children, Clint Lancaster, Lyndsey Lancaster, and Britt Lancaster, Petitioner
(149) Judy Robinson, on her own behalf and as next friend of her child, Jena Cunningham, Petitioner
(150) Frances Rodriguez, on her own behalf and as next friend of her children, Ricardo Rodriguez and Raul Rodriguez, Petitioner
(151) Alice Salas, on her own behalf and as next friend of her child, Aimee Salas, Petitioner

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CONSTITUTIONS

STATUTES

ADMINISTRATIVE REGULATIONS

TEXTS AND TREATISES

BRIEF FOR RESPONDENTS EANES INDEPENDENT SCHOOL DISTRICT, *ET AL.*

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents Eanes Independent School District, Sheldon Independent School District, Arlington Independent School District, Carthage Independent School District, McMullen Independent School District, Lago Vista Independent School District, Rockdale Independent School District, Klondike Independent School District, Riviera Independent School District, Beckville Independent School District, Pinetree Independent School District, Miami Independent School District, Rankin Independent School District, Eustace Independent School District, Lake Travis Independent School District, Austwell Tivoli Independent School District, Hardin Jefferson Independent School District, Hurst Euless Bedford Independent School District, Grapevine-Colleyville Independent School District, Eagle Mountain-Saginaw Independent School District, Cleburne Independent School District, and Longview Independent School District respectfully submit this brief in response to Petitioners' and Petitioner-Intervenors' Applications for Writ of Error.[1]

STATEMENT OF THE CASE

Petitioners herein originally sought and obtained a judgment from the Travis County District Court declaring the Texas School Finance System[2] to be unconstitutional. The trial court entered judgment that the Texas School Finance System violated TEX. CONST. art. I, § 3 (equal rights), art. I, § 19 (due course of law), and art. VII, § 1 (efficient school system).

The Court of Appeals reversed the judgment of the trial court and rendered judgment that Petitioners take nothing. *Kirby v. Edgewood Independent School District*, 761 S.W.2d 859 (Tex.App.—Austin 1988).

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[1]Because of the number and nature of the Points of Error urged by Petitioners and Petitioner-Intervenors (hereinafter referred to collectively as "Petitioners") and the necessity for a full and complete discussion of these Points of Error, Respondents Eanes Independent School District, *et al.*, will brief only Reply Points Nos. 2 and 6. Respondents Eanes Independent School District, *et al.*, adopt the position and Briefs submitted by the other Respondents in this case with respect to the remaining Reply Points and Cross Point. Specifically, Respondents Eanes Independent School District, *et al.*, adopt the position and Brief of Respondents State of Texas, *et al.*, with respect to Reply Points Nos. 1 and 5, and Cross Point No. 1, Respondent Irving Independent School District with respect to Reply Point No. 3, and Respondents Andrews Independent School District, *et al.*, with respect to Reply Point No. 4.

[2]The trial court adopted Petitioners' definition of the Texas School Finance System as "Texas Education Code § 16.01, *et seq.*, implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education." Tr. 501-02.

Petitioners now seek to have this Court reverse the judgment of the Court of Appeals. The decision of the Court of Appeals was correct, however, and should be affirmed.

REPLY AND CROSS POINTS

REPLY POINT NO. 1

THE COURT OF APPEALS PROPERLY BALANCED THE RESPECTIVE ROLES OF THE COURT AND LEGISLATURE UNDER THE TEXAS CONSTITUTION.

REPLY POINT NO. 2:

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE TEXAS SCHOOL FINANCE SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE TEXAS CONSTITUTION.

REPLY POINT NO. 3

THE COURT OF APPEALS PROPERLY ANALYZED THE TEXAS CONSTITUTION IN LIGHT OF ITS HISTORICAL DEVELOPMENT.

REPLY POINT NO. 4

THE COURT OF APPEALS PROPERLY ASSESSED THE ROLE OF THE INDEPENDENT SCHOOL DISTRICTS WITHIN THE CONSTITUTIONAL FRAMEWORK UNDER THE TEXAS SCHOOL FINANCE SYSTEM.

REPLY POINT NO. 5 AND CROSS POINT NO. 1

PETITIONERS HAVE NOT PROPERLY RAISED THEIR ARTICLE I, § 19 CLAIM.

REPLY POINT NO. 6

ATTORNEY'S FEES ARE NOT RECOVERABLE.

STATEMENT CONCERNING THE FACTS

Texas has been, since early in its history, committed to a dual approach to the financing of public schools. The Constitution of 1836, under which the Republic of Texas was governed, stated that it would be the duty of Congress, "as soon as circumstances will permit, to provide by law, a general system of education." Constitution of 1836, General Provisions, § 5. Subsequently, when Texas was admitted to the Union, the Constitution of 1845 also contained a

provision for the establishment of free public schools.[3] But by 1883, it became clear that the meager support that education had previously received from the State was not sufficient, and the Constitution was amended to provide for the creation of local school districts to share in the task of financing public education. *See generally* Plaintiff-Intervenors' Exhibit 235 at 2-5 [hereinafter cited as *The Basics of Texas Public School Finance*]. These local school districts were given authority to levy property taxes for the erection of school buildings and for the "further maintenance of public free schools." TEX. CONST. of 1876, art. VII, § 3, as amended, Aug. 14, 1883.

Thus, in 1883, support for local public schools consisted of a combination of state and local support. State support came in the form of flat per-student distributions from the state's Available School Fund.[4] Local support was made possible by constitutional provisions allowing rural common school districts to levy an ad valorem tax of up to 20 cents per $100 and town schools to levy a tax of up to 50 cents per $100. *See generally The Basics of Texas Public School Finance* at 5.

Over the next seven decades, a number of factors combined to result in ever-increasing differences in the amounts being spent by local school districts. One such factor was the constitutional provision of 1883 which allowed town schools to tax at a higher rate than rural schools. Differing willingnesses to tax also accounted in part for the differences in educational spending between districts. *See The Basics of Texas Public School Finance* at 4-5. Moreover, Texas was gradually moving from a primarily agrarian economy in which the property wealth of the State was fairly evenly distributed throughout the State to an industrial economy, with more concentrated wealth and a population shifted from rural areas to the cities. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 9, 93 S.Ct. 1278, 1283, 36 L.Ed.2d 16 (1973).

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[3]TEX. CONST. art. X, § 1 (1845): "A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of public schools." *See also id.* § 2: "The Legislature shall, as early as practicable, establish free schools through the State, and shall furnish means for their support by taxation on property . . . ."

[4]Pursuant to the Constitution of 1876, the Available School Fund consisted of income from a Permanent School Fund, a maximum of one-fourth of the general revenue, and a portion of the state's dog tax. TEX. CONST. art. VII, § 3 (1876). The Permanent School Fund consisted of all funds previously allocated to education but not spent, a permanent endowment established in 1845, and half the public domain—a value in excess of $42 million. *See generally The Basics of Texas Public School Finance* at 5.

Although some effort was made in Texas to ease the growing disparity in educational spending between rural and urban areas in the early part of this century, *see generally The Basics of Texas Public School Finance* at 6-8, the major change to the Texas school finance system came in 1949. In that year the Texas legislature, following a national trend in the area of school finance [SF 4894-95], adopted a school finance plan, known as the Gilmer-Aiken Act, which included a Minimum Foundation Program [SF 42]. This program guaranteed that certain basic educational elements would be available to all school districts that participated in the program, regardless of the local wealth of the district. [SF 42] This program called for state and local contributions to a fund set aside for teacher salaries, operating expenses of schools, and transportation costs; the State paid 80 percent of the cost of this fund and the local school districts paid 20 percent of the cost. [SF 42] The share paid by local school districts, called the Local Fund Assignment, was apportioned among the school districts under a formula designed to reflect each district's relative ability to raise taxes. *See Rodriguez,* 411 U.S. at 9-10, 93 S.Ct. at 1284, 36 L.Ed.2d 16.

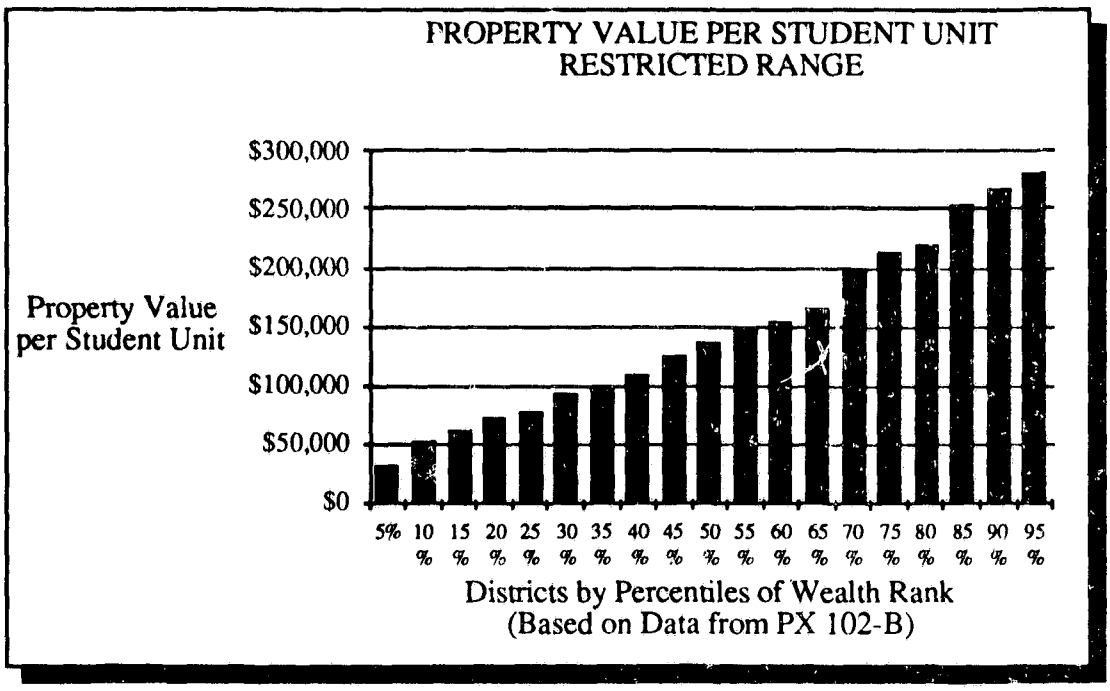
> The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children but that would not by itself exhaust any district's resources.

Id., 411 U.S. at 10, 93 S.Ct. at 1284, 36 L.Ed.2d 16 (footnotes omitted).

The Texas School Finance System as it exists today is a refinement of the original Minimum Foundation Program. In 1975, the Texas legislature revised the Foundation School Program to add equalization aid directly aimed at alleviating relative differences among districts in their ability to raise funds for education. Major reform came, however, in 1984 under House Bill 72. In a special session lasting from June 4 to July 3, 1984, the Texas legislature met to consider sweeping changes to all aspects of education in Texas, including education finance. The result, House Bill 72, was characterized by Dr. Richard Hooker, Petitioners' lead expert witness, as "the most comprehensive reform bill passed in the United States by any state." [SF 52] In terms of school finance, House Bill 72 provided great increases in funding to property-poor school districts and actually reduced state funding to some 200 wealthy school districts, a reduction that was

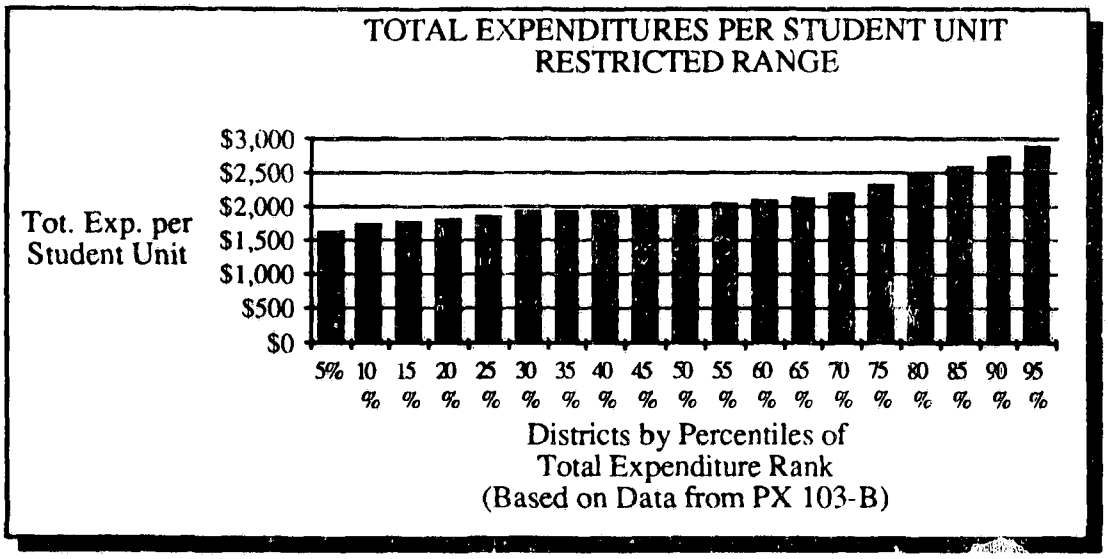
practically unheard of in the annals of school finance reform, where legislation almost always guarantees that wealthy school districts will at least not lose any money. [SF 54]

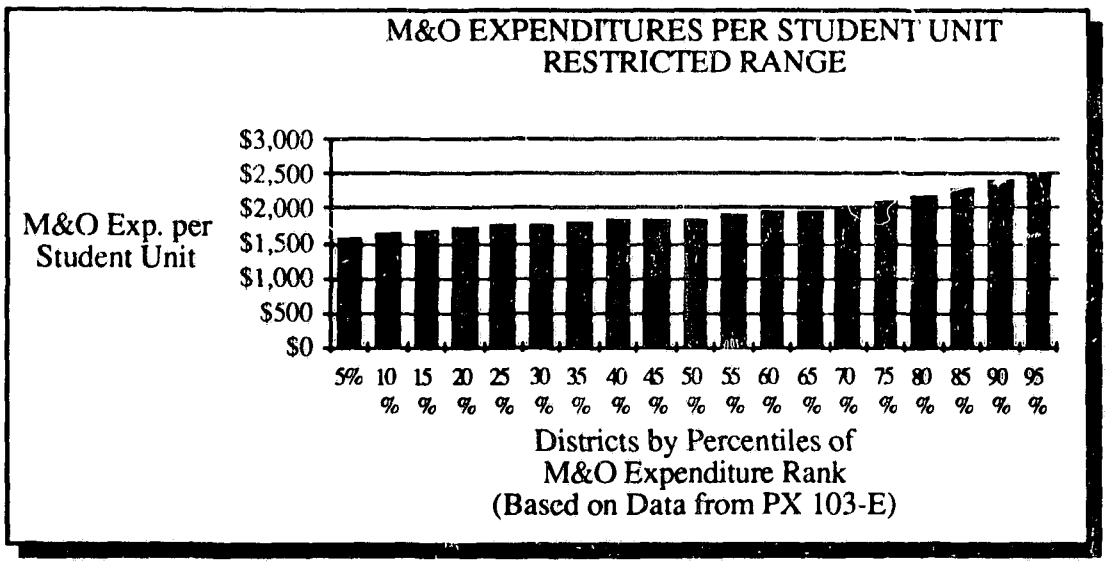
The Texas Foundation School Program creates a system of highly equalized funding for more than eleven hundred school districts with greatly varying property wealth. The following charts (Defendant Intervenor Exhibits 10-12) show the relevant before and after. Each of these exhibits was prepared from data offered by Petitioners in the trial court. The exhibits illustrate the data from a perspective referred to in school finance literature as the "restricted range." This range—from the fifth to the ninety-fifth percentile—excludes data from the extremes of a system that would distort the true statistical picture of the system. [SF 621-22] The first chart (Defendant Intervenor Ex. 10) demonstrates the wide variation of property values available for taxation among Texas school districts. If there were no Texas Foundation School Program, no state aid for education, and every district taxed at an equal level, the money available for education in each district would be in direct proportion to the variation in property wealth illustrated by Defendant Intervenor Ex. 10.[5]



[5]Defendant Intervenor Ex. 10 is a ranking of school districts by property wealth. Defendant Intervenor Exs. 11 and 12 are ranked according to expenditure levels. This distinction is important since the districts with lowest property wealth do not always *spend* the least. Conversely, districts with relatively higher property wealth do not necessarily *spend* more on education. *Compare* Plaintiff Ex. 102-A with Plaintiff Ex. 103-A.

The second and third charts (Defendant Intervenor Exs. 11, 12) reveal total expenditures (including expenditures relating to the construction of facilities) and total maintenance and operating expenses, respectively.





These charts clearly illustrate a school finance system specifically designed to distribute state funds with the objective of offsetting the vast disparities in property wealth that exists among the school districts of Texas.[6] The legislature's enactment of House Bill 72 was a significant step toward increased equity in school finance, and this fact was acknowledged by witnesses for both

[6]For a general discussion of the minimum foundation program concept see the testimony of Petitioners' witness, Dr. Billy Walker at SF 2120-159.

Petitioners and Respondents. The bill took state aid away from property-wealthy school districts and redistributed it, along with funds generated by one of the largest tax increases in the history of Texas, to property-poor districts.[7] It is this historic reform that Petitioners attack as unconstitutional.

Texas is not unique in having experienced a constitutional challenge made on the basis of state constitutional provisions. Since 1971, at least twenty state supreme courts other than Texas have been called upon to review the constitutionality of their state systems. The majority of these courts have upheld the constitutionality of their school finance systems.[8] Only one court in the 1980s has found education to be a fundamental right.[9] And of all twenty state cases, only three cases have declared their school finance systems unconstitutional on the basis of constitutional provisions specifically relating to education.[10] For the convenience of the Court in comparing Texas law with conclusions reached by other state courts concerning their school finance systems, Respondents Eanes I.S.D., *et al.*, have included Appendix B for the Court's reference. Appendix B is a table listing the school finance cases that have been decided in other states with a brief description of their central holdings.

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[7]A description of the legislative history of H.B. 72 is contained in the testimony of Petitioners' witness, Dr. Richard Hooker at SF 553-60. *See also* the testimony of Dr. William Kirby at SF 6612, 6646-47, 6796-97.

[8]*See Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987); *Hornbeck v. Somerset County Board of Education*, 458 A.2d 754 (Md. 1983); *Board of Education, Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *dism'd*, 459 U.S. 1138, 103 S.Ct. 775, 74 L.Ed.2d 986 (1983); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Co. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Board of Education v. Walter*, 390 N.E.2d 813 (Oh. 1979), *cert. denied*, 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1980); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973)(en banc).

But see Helena Elementary School District No. 1 v. State, No. 88-381 (Mont. February 1, 1989)(unpublished opinion); *Dupree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983); *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wa. 1978)(en banc); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Serrano v. Priest*, 557 P.2d 929 (Ca. 1976); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

[9]*See Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980). The following cases decided in the 1980s have found no fundamental right to education under their state constitutions. *See Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987); *Hornbeck v. Somerset County Board of Education*, 458 A.2d 754 (Md. 1983); *Board of Education, Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *dism'd*, 459 U.S. 1138, 103 S.Ct. 775, 74 L.Ed.2d 986 (1983); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Co. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 (1981).

[10]*See Helena Elementary School District No. 1 v. State*, No. 88-381 (Mont. February 1, 1989)(unpublished opinion); *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wa. 1978)(en banc); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). The Montana case is unique in that the constitutional provision under which the Montana Supreme Court found its system of school finance unconstitutional explicitly guaranteed "equality of educational opportunity." *See* MONT. CONST. art. X, § 1.

BRIEF OF THE ARGUMENT

REPLY POINT NO. 1

THE COURT OF APPEALS PROPERLY BALANCED THE RESPECTIVE ROLES OF THE COURT AND LEGISLATURE UNDER THE TEXAS CONSTITUTION. (Response to Points of Error Nos. 10-14, 16 of Petitioners Edgewood I.S.D., *et al.*, and Points of Error Nos. 5-6 of Petitioners Alvarado I.S.D., *et al.*)

Respondents Eanes Independent School District, *et al.*, hereby incorporate by reference the argument and authorities presented by Respondents State of Texas, *et al.*, with respect to Reply Point No. 1.

REPLY POINT NO. 2:

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE TEXAS SCHOOL FINANCE SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE TEXAS CONSTITUTION. (Response to Points of Error Nos. 1-9 of Petitioners Edgewood I.S.D., *et al.*, and Points of Error Nos. 1-4 of Petitioners Alvarado I.S.D., *et al.*)

I.

General Standards Applicable to Equal Protection Analysis

The equal protection clause of the Texas Constitution,[11] like its federal counterpart,[12] defines the limits of governmental action that has the effect of classifying individuals differently. That a legislature can legitimately employ classifications resulting in differential treatment is undisputed. *See, e.g., Railroad Commission of Texas v. Miller,* 434 S.W.2d 670, 673 (Tex. 1968)(state may classify its citizens into reasonable classes and apply different laws, or its laws differently, to the classes without violating equal protection); *Sullivan v. University Interscholastic League,* 616 S.W.2d 170, 172 (Tex. 1981)("[S]tate cannot function without classifying its citizens for various purposes and treating some differently than others."). But legislative classifications are subject to judicial review to assure that such classifications remain within proper bounds. This review proceeds, however, on the presumption that a statute is valid. *See Spring Branch*

[11] "All free men, when they form a social compact, have equal rights . . . ." TEX. CONST. art. 1, § 3.
[12] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, §1.

Independent School District v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985), *appeal dism'd*, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986). Moreover, it is presumed that the legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not sufficient grounds to strike down legislation as being arbitrary or unreasonable. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

Several decades of development in the area of equal protection in the federal courts and in Texas courts have resulted in a straightforward test for determining the validity of a governmental classification. A classification will not be struck down so long as it is rationally related to a legitimate state interest unless (a) the classification implicates a "fundamental interest" or (b) the classification affects a "suspect class." *See Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985); *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986).[13] In the latter two instances classifications must satisfy an exacting standard of review. When a "fundamental interest" or a "suspect classification" is involved, it must be shown that the state has a compelling interest which the classification is the least restrictive means of achieving.

To determine the present equal protection challenge, the Court must first determine how the State has classified its citizens with respect to the provision of public education.[14] With the assumption that the State is ultimately responsible for the alignment and configuration of school district boundaries, the evidence adduced at trial demonstrates that the provision of public education in the State of Texas is made pursuant to three broad classifications:

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[13] The United States Supreme Court, in cases relating to gender, illegitimacy, and illegal alien status, has occasionally employed an intermediate degree of scrutiny between either of the two levels described in the text. *See, e.g., Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)(gender); *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978)(illegitimacy); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)(illegal aliens). In these cases the Court has required that the classification, to be upheld, must be "substantially related" to an "important governmental objective." *Craig v. Boren*, 429 U.S. at 197, 97 S.Ct. at 456-57, 50 L.Ed.2d 397. There is neither federal nor Texas authority, however, for using the middle-tier analysis to review all classifications relating to education. *See infra*, pp. 30-32.

[14] The Petitioners contend that the State of Texas has ultimate responsibility for the existence and present configuration of school district boundaries in the State and that differences in the provision of education traceable to varying local property wealth are State classifications subject to equal protection analysis. The State Respondents contend that the only State classifications relating to education are those made in the Foundation School Program, TEX. EDUC. CODE § 16.01, *et seq.* Respondents Eanes I. S. D. *et al.* refer the Court to the State's brief on this point. For purposes of the equal protection discussion that follows, Respondents Eanes I. S. D., *et al.*, will simply assume for the purpose of argument that the State classifications subject to equal protection review in this case include those created by the varying property wealth of local school districts.

1. *A classification according to the property wealth of local school districts.*

The classification according to district property wealth operates in two directions depending upon whether one focuses upon local school district boundaries, or upon the State's Foundation School Program. Viewing only the local school district boundaries and the funds raised by local school districts for education, one may conclude that local districts with more property wealth tend to raise more local money for the provision of education than districts with lesser amounts of property wealth. Viewing only the Foundation School Program, one must conclude that school districts are classified according to their relative property wealth by the State and those with lesser amounts of property wealth receive more State funds than those with greater amounts of property wealth. [SF 4915]

2. *A classification according to the willingness of local school districts to tax themselves for educational purposes.*

Some of the variations in funds available to local school districts for education may be accounted for by the varying willingness of local school districts to tax themselves. Some property-poor school districts tax themselves less than other property-poor school districts and other wealthier districts. The converse is also true. Since the State allows local school districts some flexibility in the amount of taxes such districts levy for educational purposes, the State has essentially allowed a classification according to local tax effort.

3. *A classification according to the cost of education for certain types of children in certain types of school districts.*

The Foundation School Program implements a variety of formulas to disperse State educational funds in differing amounts to school districts to reflect the higher cost of educating certain types of children (bilingual, handicapped, etc.) and the higher cost of educating all children in certain types of school districts (small or sparsely populated school districts, for example). Petitioners have not complained about these classifications.

Although Petitioners succeeded in focusing the trial court's attention on one classification relevant to the provision of education in the State of Texas (the varying wealth of local school districts) and upon only one facet of that classification (the relatively greater amounts of local funds available to wealthier property districts, as opposed to the relatively greater amounts of state funds available to the poorer property districts), their limited focus distorted the total picture. Multiple

classifications exist in this State with respect to the financing of education, and it is their combined effect which is at issue, rather than the isolated effect of any one classification considered piecemeal from the others.

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT EDUCATION IS NOT A FUNDAMENTAL RIGHT UNDER THE TEXAS CONSTITUTION FOR PURPOSES OF EQUAL PROTECTION ANALYSIS

A. The Court of Appeals Followed Established Texas Precedents to Conclude That Education Is Not a Fundamental Right.

This Court has specifically held that the standard to be applied in reviewing the legislative provisions for education mandated by TEX. CONST. article VII, § 1 is the rational basis test. In *Mumme v. Marrs*, 120 Tex. 383, 40 S.W.2d 31 (Tex. 1931), the Court considered a challenge to a legislative school finance enactment and, in upholding the enactment, commented as follows:

> Since the Legislature has the mandatory duty to make suitable provision for the support and maintenance of an efficient system of public free schools, and has the power to pass any law relative thereto, not prohibited by the Constitution, it necessarily follows that it has a choice in the selection of methods by which the object of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate . . . . The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.

40 S.W.2d at 36. By this reasoning the Court upheld what was essentially a school finance reform statute (a minor version of what House Bill 72 was in terms of finance reform) from an equal protection challenge. This holding essentially sets forth the rational basis test, a test that cannot be applied where a fundamental interest is implicated. In the course of its analysis, it noted further that even the legislature was limited in its reform efforts by certain fundamental realities.

> It is true that equality of educational opportunities for all may not be brought about by the law, but the inequalities which may continue will exist rather by reason of differences in population, wealth, and physical conditions of the school districts or communities, and a failure of local authorities to exercise their constitutional power of taxation, than from the law itself.

Id. The holding of *Mumme v. Mars* has recently been reiterated by this Court in *Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556 (Tex. 1985), *appeal dism'd*, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986). In *Stamos*, *id.* at 559, this Court held:

> Section 1 of Article VII of the Constitution establishes a mandatory duty upon the Legislature to make suitable provision for the support and maintenance of public free schools. *The Constitution leaves to the Legislature alone the determination of which methods, restrictions, and regulations are necessary and appropriate to carry out this duty, so long as that determination is not so arbitrary as to violate the constitutional rights of Texas' citizens.* (Emphasis added, citation omitted.)

Thus, the question of which level of scrutiny is commanded by TEX. CONST. article VII, § 1 (and, correspondingly, whether a fundamental right is implicated) has been answered and recently affirmed by this Court.

It must be recalled that a determination of whether a right is fundamental is simply a prelude to the determination of what standard of review must be applied to a given classification. In *Mumme v. Marrs*, however, the latter determination itself was made; and therefore, as a matter of law, education cannot be a fundamental right under the Texas Constitution. This is precisely the reasoning adopted by this Court in *State of Texas v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex. 1987). There Plaintiffs argued that the provisions of House Bill 72 relating to teacher testing had to meet the strict scrutiny standard because the statute impinged upon the fundamental right to practice a profession. This Court, however, looked to *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957), in which the United States Supreme Court had stated that a state "can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or ability to practice law." This Court then found that "[i]f a state's standards are required only to be rationally related to the state's purpose of licensing only those who are qualified, then a person's interest in practicing law is not a fundamental one. Likewise, we hold a person's interest in teaching is not a fundamental right." 724 S.W.2d at 391.

In the *Project Principle* case this Court reasoned backwards, in a sense, to the fundamental right question. It had authority for the proposition that licensing requirements needed only meet a rational basis test; thus, the question of whether the right to teach was "fundamental" was necessarily determined. It could not be, given the standard of scrutiny already established. Respondents' argument here is the same. The standard of scrutiny for legislation dealing with education has already been determined by *Mumme v. Marrs*—the rational basis test. Thus, education cannot be a fundamental right.

Nor can *Mumme v. Marrs* be discredited merely because of its age. As indicated below, the test adopted by the Court in that case is precisely the test recognized by a majority of the states that have considered the fundamental right question in relation to education since the early 1970s. Moreover, the test adopted and this Court's reasoning in support of that test is consistent with the United States Supreme Court's treatment of education and related social and economic issues.

The decision of the Court of Appeals below was, of course, not the first occasion upon which a Texas appellate court has considered the appropriate standard of review for education matters. In *Hernandez v. Houston Independent School District,* 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), the Austin Court of Appeals itself, citing *Rodriguez,* determined that a "tuition-free education is not a 'fundamental right' guaranteed by the Constitution of the United States," and applied rational basis analysis to review a statute under the equal protection clauses of the United States and Texas constitutions. *Id.* at 124. Although the holding in *Hernandez* as to the construction of the federal equal protection clause was implicitly overruled by the United State Supreme Court's decision in *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 786 (1982), the Court in *Plyler* specifically affirmed the holding in *San Antonio v. Rodriguez* that education is not a fundamental right under the United States Constitution. Therefore, on the issue of whether education is a fundamental right under either the Texas Constitution or the United States Constitution, *Hernandez* was not overruled.

At least one other Court of Appeals has applied the rational basis test to review legislative classifications relating to education. In *Rodriguez v. Ysleta Independent School District,* 663 S.W.2d 547 (Tex. App.—El Paso 1983, no writ), the El Paso Court of Appeals reviewed a school district policy which prohibited a child whose parents did not reside in the district from attending public school, even though the child resided in the district. The plaintiffs in the case had challenged the policy as violating the equal protection clauses of both the United States and the Texas Constitutions. The court, however, found that the policy was one "reasonably related" to the needs of the school district and did not deny equal protection. In essence, then, the court applied rational basis analysis and, thus, implicitly found that no fundamental right (e.g. education) was implicated.

Petitioners tout a sentence from *Stout v. Grand Prairie Independent School District*, 733 S.W.2d 290 (Tex. App.—Dallas 1987, writ ref'd n.r.e.), to support their fundamental right argument. In *Stout*, the Dallas Court of Appeals considered the issue of whether statutory immunity granted teachers violated the open courts provision of the Texas Constitution, or the due process or equal protection clauses of the federal and Texas constitutions. In the course of determining that the immunity did not violate the Texas open court provisions, the court observed that the legislative interest being furthered by the immunity scheme was compelling, because "[p]ublic education is a fundamental right guaranteed by the Texas constitution." *Id.* at 294.

This Court should not accord the isolated statement from *Stout* any weight for at least three reasons. First, the observation in *Stout* was not made in the course of any equal protection analysis. The Dallas court made this observation in the course of its analysis of the effect of the open courts provision of the Texas Constitution. *See id.* Second, the language from *Stout* is clearly dicta. The issue before the Dallas Court of Appeals was whether the State had a compelling interest in granting immunity to teachers from suits. The court needed only to find that the provision of education was a compelling interest of the State. That an interest is compelling does not mean that it is fundamental. In fact, to confuse these two terms of art—"compelling state interest" and "fundamental interest"—is to muddy the waters of equal protection. The assertion that education was a "fundamental interest" was simply irrelevant to the matter at issue in *Stout*. Third, the Dallas court's only authority for its assertion that education was a fundamental right was its reference to the Texas constitutional provision concerning education, TEX. CONST. art. VII. This simple reference without discussion is hardly support for the far-reaching conclusion implied by the court's assertion, and should be rejected by this Court.

Even in the absence of the holdings discussed above, however, a proper understanding of equal protection principles should lead this Court to conclude that education is not a "fundamental right" under the Texas Constitution so as to subject the Texas School Finance System to strict scrutiny.

B. General Criteria for Determining the Existence of a Fundamental Right.

Before a court can determine whether education is a "fundamental right," it must first determine what it means for a right to be "fundamental" for purposes of equal protection analysis.

Certainly, the issue is not whether education is of "fundamental" importance in some abstract sense. Rather, the question to be answered is whether, based on an understanding of equal protection analysis and the concerns the equal protection clause was intended to vindicate, education is "fundamental" in the sense necessary to justify the exacting scrutiny of law which that label carries in equal protection analysis. "[T]he inquiry is whether the affected interest . . . should enjoy that judicial protection necessary to vindicate the equal protection doctrine as drawn from constitutional text and history." *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1202 (5th Cir. 1985). Moreover, because a determination that an interest is fundamental invokes strict scrutiny review and virtually ties the hands of the legislature to deal with a given area, the question must also be: what kinds of interests must be essentially removed from the arena of legislative enactment? Thus, the determination that an interest is fundamental "involves a judicial determination that the text or structure of the Constitution evidences the existence of a value that should be taken from the control of the political branches of government." 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 327 n.21 (1986).[15]

These considerations counsel this Court to reject the simplistic tests urged by Petitioners to determine that education is a "fundamental interest." The tests proposed by the Petitioners focus on two factors to find education "fundamental": (1) the general importance of education, and (2) the specific reference to education in the Texas Constitution, particularly in TEX. CONST. art. VII, § 1.[16] For the reasons discussed below, neither of these tests is an appropriate benchmark for equal protection analysis, and the Court of Appeals properly rejected these tests. *See Kirby v. Edgewood Independent School District*, 761 S.W.2d 859, 862-63 (Tex. App.—Austin 1988).

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[15]In view of the severe limitations placed upon legislative action when an interest or right is deemed fundamental, the list of such fundamental rights has remained closely limited. Construing the equal protection clause of the Fourteenth Amendment to the United States Constitution, the Texas Court of Criminal Appeals has indicated that fundamental rights include the right to privacy, the right to vote, rights guaranteed by the First Amendment, the right to procreate, and the right to interstate travel. *See Clark v. State*, 665 S.W.2d 476, 480 n.3 (Tex. Crim. App. 1984)(en banc).

[16]Article VII, § 1 states as follows:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

C. The Court of Appeals Properly Declined to Focus Upon the "Importance" of Education and References to Education in the Texas Constitution.

1.

The Importance of Education Is Not Determinative.

In *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970),[17] the United States Supreme Court considered a challenge to a Maryland welfare statute that apportioned welfare payments based upon the number of members of a family. As the number of family members increased, then, according to the statute in question, payments were proportionately reduced. This scheme was attacked in part on grounds that it violated the equal protection clause of the United States Constitution. Although the Court recognized that the case involved "the most basic economic needs of impoverished human beings," it nevertheless declined to subject the statute in question to the heightened scrutiny required when fundamental interests are involved. 397 U.S. at 485, 90 S.Ct. at 1162, 25 L.Ed.2d 491. When later urged in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33, 93 S.Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1973), that education should be viewed as a "fundamental" interest on the basis of its importance, the Court again cited the holding of *Dandridge* and noted that although the welfare benefits involved in that case were of "central importance" and involved "the most basic economic needs," the benefits were nevertheless not of such a fundamental nature as to require strict scrutiny. 411 U.S. at 33, 93 S.Ct. at 1296-97, 36 L.Ed.2d 16.

The Supreme Court's analysis would therefore reject as constitutionally significant the Petitioners' appeal to the central role that public education has played in this State. According to *Rodriguez*, centrality is not the issue. Importance is not the issue. It does not even matter that, in common speech, the adjective "fundamental" might be used to describe a right or interest.[18]

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[17]Respondents are fully aware that Texas courts are not bound by federal case law in their construction of the Texas Constitution. *See Whitworth v. Bynum*, 699 S.W.2d 194, 196 (Tex. 1985). Nevertheless, in the identification of "fundamental" interests for equal protection analysis under the Texas Constitution, Texas courts have consistently relied upon federal precedents under the United States Constitution. For example, recently in *State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987), this Court summarily rejected the claim that the right to practice a profession was a fundamental right so as to subject to strict scrutiny a portion of House Bill 72 requiring testing of teachers. The Court simply looked to *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed. 2d 796 (1957), which held that a classification involving the practice of law was subject to the rational basis test, likened the practice of law to the profession of teaching, and concluded that no fundamental right was implicated.

[18]*See Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397, 72 L.Ed.2d 786 (1982)(recognizing that "education has a fundamental role in maintaining the fabric of our society" but nevertheless reiterating the holding of *Rodriguez* that education was not a "fundamental" right). Thus, Petitioners' appeal to the dictionary to define "fundamental"

Instead, the Court found that before a governmental classification would be subjected to the exacting scrutiny required when "fundamental" rights are implicated, it had to be demonstrated that the right was either "explicitly or implicitly" guaranteed in the Constitution. 411 U.S. at 33, 93 S.Ct. at 1297, 36 L.Ed.2d 16. However, as the discussion below indicates, even this test, however appropriate for interpretation of the United States Constitution, is inappropriate for use in Texas constitutional analysis.

2.

That the Texas Constitution Makes Explicit Provisions for Education Does Not Control Equal Protection Analysis.

The isolated language from *Rodriguez* adopted by the trial court was based on an analysis of *the United States Constitution*. The United States Supreme Court in *Rodriguez* did not purport to lay down a principle to be used in the construction of *state* constitutions. To have done so would have demonstrated gross disregard for the fundamental difference between the United States Constitution and state constitutions, including the Texas Constitution.

Texas, like many other states, has many laws which are usually considered legislation inserted into its Constitution. Unlike the United States Constitution, which is a document of restricted authority and delegated powers, the Texas Constitution does not restrict itself to addressing only those areas that are fundamental. The Texas Constitution is, in this regard, similar to the constitutions of most other states. It is therefore not surprising that a majority of the states faced with the question of whether education should be found "fundamental" under their constitutions have held that it is not, and have declined to pluck the *Rodriguez* test (i.e., whether a right is explicitly or implicitly guaranteed in the Constitution) out of its context and apply it to their state constitutions. *See Fair School Finance Council of Oklahoma, Inc. v. Oklahoma,* 746 P.2d 1135, 1149 (Okla. 1987); *Hornbeck v. Somerset County Board of Education,* 458 A.2d 754, 786 (Md. 1983); *Lujan v. Colorado State Board of Education,* 649 P.2d 1005, 1017-19 (Co. 1982); *Board of Education v. Walter,* 390 N.E.2d 813, 818-19 (Oh. 1979), *cert. denied,* 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1980); *Horton v. Meskill,* 376 A.2d 359, 371-73 (Conn. 1977);

(*see* Plaintiff-Intervenor's Ex. 203) or the trial court's reliance on the use of the adjective "fundamental" by Dr. William Kirby (Tr. 547), fail to recognize that "fundamental right" is a term of art in equal protection analysis that cannot be defined by reference to popular dictionaries or common-place usage.

Olsen v. State, 554 P.2d 139, 144 (Or. 1976); *Thompson v. Engelking*, 537 P.2d 635, 644-45 (Idaho 1975); *Robinson v. Cahill*, 303 A.2d 273, 282-87 (N.J. 1973). Even the few states that have found their public school finance systems in violation of their respective state constitutions have largely rejected the "explicitly or implicitly guaranteed" test. *See Serrano v. Priest*, 557 P.2d 929, 952 (Ca. 1976); *Horton v. Meskill*, 376 A.2d 359, 371-73 (Conn. 1977).

Most frequently the rejection of the *Rodriguez* test is based upon the difference between the United States Constitution and state constitutions. Thus, the Colorado Supreme Court in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017 (Co. 1982), recently reasoned as follows:

> [W]e reject the "Rodriguez test." While the test may be applicable in determining fundamental rights under the United States Constitution, it has no applicability in determining fundamental rights under the Colorado Constitution. This is so because of the basic and inherently different natures of the two constitutions . . . . The United States Constitution is one of restricted authority and delegated powers. As provided in the Tenth Amendment, all powers not granted to the United States by the Constitution, nor denied to the States by it, are reserved to the States or to the People. . . . Conversely, the Colorado Constitution is not one of limited powers where the state's authority is restricted to the four-corners of the document. The Colorado Constitution does not restrict itself to addressing only those areas deemed fundamental. Rather, it contains provisions which are both equally suited for statutory enactment, as well as those deemed fundamental to our concept of ordered liberty. Thus, under the Colorado Constitution, fundamental rights are not necessarily determined by whether they are guaranteed explicitly or implicitly within the document. [Footnote omitted.][19]

Moreover, it has been suggested that the use of the *Rodriguez* test to interpret state constitutional demands would implicate other vital governmental services besides education. The court in *Robinson v. Cahill*, 303 A.2d 273, 277, 286-87 (N.J. 1973)(citations and footnotes omitted) observed:

> It must be evident that the rudimentary scheme of local government is implicated by the proposition that the equal protection clause dictates statewide uniformity. This

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[19]*See also Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987)(inappropriate to use *Rodriguez* test because of "the basic and inherently different nature of the two constitutions"); *Board of Education v. Walter*, 390 N.E.2d 813, 818 (Oh. 1979), *cert. denied*, 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1980)(Ohio constitution "contains provisions which would be suitable for statutory enactment which are not considered fundamental to our concept of ordered liberty"); *Board of Education, Levittown v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982), *dism'd*, 459 U.S. 1138, 103 S.Ct. 775, 74 L.Ed.2d 986 (1983)("The inclusion in our State Constitution of a declaration of the Legislature's obligation to maintain and support an educational system is not to be accorded the same significance for purposes of equal protection analysis as would a counterpart reference to education in the Federal Constitution."); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976)(*Rodriguez* test especially unhelpful in Oregon "where many laws which are usually considered legislation are inserted in the Constitution").

> is so unless it can be said that the equal protection clause holds education to be a thing apart from other essential services which also depend upon local legislative decision with respect to the dollar amount to be invested. As to any service to which equal protection is found to apply, it would follow that if the moneys are raised by local taxation in a way which permits a different dollar expenditure per affected resident, the program is invalid as to the beneficiaries unless a State aid program fills in the gap. It would then follow that a State aid program which did not neutralize local inequalities would itself deny equal protection as to beneficiaries; and although it is not urged upon us that every federal statute must abide by that precept, we see no reason why that constitutional mandate would not also prevail at the federal level if the basic premise is sound. . . . It is undeniable that local expenditures per pupil do vary, and generally because other essential services must also be met out of the same tax base and the total demands exceed what the local taxpayers are willing or able to endure. But for that same reason similar discrepancies, both as to benefits and burdens, can be found with respect to the other vital services which the State provides through its local subdivisions. The equal protection proposition potentially implicates the basic tenet of local government that there be local authority with concomitant fiscal responsibility.

Each of these objections to the use of the *Rodriguez* test may be urged with respect to the Texas Constitution. It also is different from the United States Constitution in that it contains provisions that could readily have been enacted as statutes, rather than constitutional provisions.[20] Matters are made the subject of guarantees that are not in any sense on the level of long-recognized fundamental rights. Is there a fundamental right to a mechanics lien, to public roads, or to investment protection?[21] Each of these matters are guaranteed or made the mandatory duty of the legislature, but it would be hard to take seriously any suggestion that these matters be classified as "fundamental" rights and classifications implicating them subjected to strict scrutiny. The use of the "explicitly or implicitly guaranteed" test is simply inappropriate in view of the nature of the Texas Constitution.

3.

In Any Event, Education Is Not "Guaranteed" by the Texas Constitution.

Only by stretching language for a predetermined purpose is it possible to suggest that education is either explicitly or implicitly "guaranteed" by the Texas Constitution. The Texas

[20] *See, e.g.*, TEX. CONST. art. III, § 49-d (acquisition and development of water storage facilities); *id.* § 52e (payment of medical expenses of law enforcement officials); *id.* § 52f (private roads in small counties); *id.* art. X, § 2 (just tariff rates); *id.* art. XII, § 6 (guarantee against watered stock); *id.* art. XVI, § 24 (roads and bridges); *id.* § 37 (mechanics liens); *id.* § 49 (protection of personal property from forced sale).

[21] *See* TEX. CONST. art. XVI, § 37 ("Mechanics, artisans and material men, of every class, shall have a lien upon the building and articles made or repaired by them . . . ."); *id.* § 24 ("The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures, and convict labor to all these purposes."); *id.* art. XII, § 2 ("General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and the individual stockholders.").

Constitution makes a clear distinction between those rights "guaranteed" to individuals (as set forth in Article I's Bill of Rights) and declarations concerning legislative responsibility (such as the declaration in Article VII, § 1 that it "shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools"). *Compare Lujan v. Colorado State Board of Education,* 649 P.2d 1005, 1017 (Co. 1982)("On its face, Article IX, Section 2 of the Colorado Constitution merely mandates action by the General Assembly—it does not establish education as a fundamental right, and it does not require that the General Assembly establish a central public school finance system restricting each school district to equal expenditures per student.").

4.

The Alleged Nexus Between Education and Freedom of Speech and the Right to Vote Should Not Confer "Fundamental" Right Status on Education.

Petitioners in this case have resurrected the "nexus" theory reject by the Supreme Court fifteen years ago in *Rodriguez.* The gist of the theory is that the provision of education is necessary for the "meaningful" exercise of freedom of speech and the right to vote; therefore, education must be a fundamental right. *See* Edgewood Brief at 37. Petitioners find special support for this alleged "nexus" in the link between "a general diffusion of knowledge" and "the preservation of the liberties and rights of the people" in TEX. CONST. article VII, § 1, and appear to suggest that the Court in *Rodriguez* would have found education a fundamental right if it had had similar language before it. *See* Edgewood Brief at 37. Petitioners, however, misapprehend the Supreme Court's reasoning.

The Supreme Court's unwillingness to elevate education into a fundamental right did not arise out of its inability to see a "nexus" between education, speech, and voting. Rather, it could find no reasoned means of distinguishing the support role of education from other important prerequisites to the "meaningful" exercise of speech and voting rights: decent food, clothing, and shelter, for example. *See Rodriguez,* 411 U.S. at 37, 93 S.Ct. at 1299. Of course there is a "nexus" between these items and meaningful speech and voting, but the Court has nevertheless declined to elevate these supporting benefits, however important or necessary, into the status of fundamental rights. Nothing in the United States Supreme Court's reasoning is peculiar to the

federal constitution, and this Court should accordingly adopt the persuasive reasoning of *Rodriguez* on this point and reject Petitioners' "nexus" argument.[22]

D. Criteria This Court Should Apply to Find That Education Is Not a Fundamental Interest so as to Subject the Texas School Finance System to Strict Scrutiny.

1.

Education Is Not on the Same Level as the Rights to Free Speech or Free Exercise of Religion, Which Have Long Been Recognized as Fundamental Rights Under Federal and State Constitutions.

Faced with an equal protection challenge to the "no pass, no play" provisions of House Bill 72, TEX. EDUC. CODE ANN. § 21.920(b)(Vernon 1988), this Court in *Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556 (Tex. 1985), *appeal dism'd*, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986), recently suggested the approach to be taken by a court seeking to determine whether a right is "fundamental" under the Texas Constitution. There this Court concluded that the alleged "right" to participate in extracurricular activities which was implicated by the "no pass, no play" rule did not "rise to the same level as the right to free speech or free exercise of religion, both of which have long been recognized as fundamental rights under our state and federal constitutions." *Id.* at 560. *See also Board of Regents v. Roth*, 408 U.S. 564, 570-73, 92 S.Ct. 2701, 2705-07, 33 L.Ed.2d 548 (1972).

It is precisely this approach that should determine the outcome of the present case. Education, while an important interest of the citizens of Texas, simply does not rise to the level of rights such as free speech or free exercise of religion, nor has it been long recognized as "fundamental." Petitioners would have this Court elevate an admittedly important interest in education into a right on a par with rights long recognized by both federal and state courts as fundamental, rights that do not depend for their existence upon public financial support.[23] Furthermore, in so elevating the interest in education to a fundamental right, the trial court engaged

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[22]As the Court of Appeal notes in its opinion, the trial court does not appear in any event to have found that any Texas students are denied that level of education which is necessary for the "meaningful" exercise of freedom of speech and the right to vote. *Kirby v. Edgewood Independent School District*, 761 S.W.2d 859, 862 n.5. (Tex. App.—Austin 1988).

[23]Thus, the Court of Appeals concluded that the term "fundamental right" refers to "a limitation upon the exercise of governmental power; it does not imply an affirmative obligation upon government to insure that all persons have the financial resources available to exercise their liberty or fundamental rights." *Kirby v. Edgewood Independent School District*, 761 S.W.2d 859, 863 (Tex. App.—Austin 1988).

in innovation, not the recognition of settled legal principles. It found within the text of the Texas Constitution a supposed fundamental right that has escaped the attention of more than a hundred years of Texas jurists.

This Court in *Stamos* also noted that fundamental rights "have their genesis in the express and implied *protections of personal liberty* recognized in federal and state constitutions." *Id.* (emphasis added). Education, of course, is not a matter of personal liberty. It is, rather, a form of social or welfare benefit whose value the State of Texas has recognized and for which it has provided. The right to free speech and free exercise of religion are, on the other hand, personal liberty interests. As such, the legislature's ability to impact them is circumscribed tightly by classifying these interests as fundamental and subjecting classifications implicating them to strict scrutiny review. Education is not a right in the strict sense. It is a benefit the State provides, and the State's provision of this benefit should not be subject to the same scrutiny warranted when the State legislates concerning a matter of personal liberty.[24]

2.

Education Should Fall Within the General Rule That Social and Economic Legislation Will Not Be Subjected to Strict Scrutiny.

As noted above, in *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), the Court upheld a provision of Maryland's Aid to Families with Dependent Children program that limited the monthly grant to any one family to $250, regardless of its size or computed need. Although the Court recognized that the subsistence benefits were of "central importance" and involved "the most basic economic needs," it concluded the benefits were nevertheless not of such a fundamental nature as to require strict scrutiny. In so concluding, the Court remarked:

> [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out

[24]See generally the discussion concerning the distinction between personal liberties and government assistance which is not a matter of constitutional entitlement in *Texas Department of Human Resources v. Texas State Employees Union CWA/AFL-CIO*, 696 S.W.2d 164, 171-72 (Tex. App.—Austin 1985, no writ).

> of harmony with a particular school of thought." That era long ago passed into history . . . .

Id. at 484, 90 S.Ct. at 1161 (citations and footnote omitted).

Four years after its decision in *Dandridge*, in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the Court upheld a local zoning ordinance that restricted land use to one-family dwellings against a challenge by six unrelated college students. Again the Court found no fundamental right implicated. Instead, it viewed the challenged ordinance as falling into the category of "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a [permissible] state objective." *Id.* at 6, 94 S.Ct. at 1540, 39 L.Ed.2d 797. Even in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), in which the Court struck down a Connecticut law limiting the use of contraceptives and found a fundamental right to privacy within the "penumbras" of the Bill of Rights, the Court commented that it did not sit "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.* at 482, 85 S.Ct. at 1680, 14 L.Ed.2d 510.

The determination in *Rodriguez* that the Texas School Finance System did not constitute an equal protection violation was therefore rooted in the Court's steadfast refusal to give constitutional stature to wealth redistribution schemes under the guise of fundamental right analysis. The complex problems involved in addressing traditional social ills were to be left to legislatures. Thus, in *Rodriguez*, against the challenge that Texas impermissibly relied upon local property taxes to finance education, the Court observed:

> No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

411 U.S. at 41, 93 S.Ct. at 1301, 36 L.Ed.2d 16. And regarding the appropriate standard for reviewing legislative attempts to provide schooling to a state's children, the Court further noted:

> The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect.

Id. at 42, 93 S.Ct. at 1301-02, 36 L.Ed.2d 16.

Rodriguez is therefore a reasoned justification, consistent with a broader range of cases, for a court to refrain from venturing into the realm of social legislation under the cloak of fundamental right analysis. As such, it should be decisive for this Court's determination in the present case.[25] Moreover, other states which have considered this issue have repeatedly followed these federal precedents and found them persuasive in the context of their interpretation of state constitutional provisions. For example in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1018 (Co. 1982), the Colorado Supreme Court reasoned that it would be inappropriate for the court to "venture into the realm of social policy under the guise that there is a fundamental right to education which calls upon [it] to find that equal educational opportunity requires equal expenditures for each school child." Likewise, in *Hornbeck v. Somerset County Board of Education*, 458 A.2d 754, 786 (Md. 1983), the court observed that "[W]here social or economic legislation is involved, as here [concerning the state's system of public school finance], courts have generally avoided labeling a right as fundamental so as to avoid activating the exacting strict scrutiny standard of review." *See also Thompson v. Engelking*, 537 P.2d 635, 640 (Idaho 1975): "We reject the arguments advanced by the plaintiffs-respondents and the conclusions made by the trial court. To do otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature', legislating in a turbulent field of social, economic and political policy."

3.

It Is Inappropriate for a Court to Intrude Upon Problems Relating to the Raising and Disposition of Public Revenues.

The record in the trial court amply illustrates the complex issues raised as soon as the suggestion is made to alter the present system of financing public education in favor of some other alternative. The trial court, having expressed an interest in hearing testimony relating to alternatives to the present system, heard evidence from Petitioners on essentially two methods for obtaining a more "equitable" system of finance: massive consolidation of school districts and the

[25]The *Rodriguez* opinion was far more than a simple textual enterprise in which the Court looked for some explicit or implicit reference to education in the United States Constitution. On the contrary, it was a detailed probing of the relative competencies of the legislative and judicial branches of government to deal with issues of social and welfare legislation in general and education laws in particular.

creation of taxing jurisdictions. The evidence showed clearly that to the extent these two options were real legal possibilities, in view of the parameters set by the Texas Constitution, they simply created new problems and failed even to satisfy the criteria of equality ultimately adopted by the trial court.

The trial court, of course, was not the first occasion on which the judiciary has been called upon to consider the merits of the Texas public school finance system. In *San Antonio v. Rodriguez*, the United States Supreme Court also faced the difficult question of whether the Texas system as it existed in the early 1970s should be replaced by some more equitable scheme. That Court, however, quickly acknowledged its limitations in this area and suggested a principle that the trial court should have heeded.

> [W]e stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

411 U.S. at 41, 93 S.Ct. at 1301, 36 L.Ed.2d 16 (footnote omitted).

4.

Education Is a Complicated Subject Best Left to the Legislature.

In *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986), this Court considered a mandamus action arising out of the trial court's issuance of a temporary injunction enjoining the State High School Baseball Tournament until two high school teams were able to complete a play-off series that had been rained out. Richfield High School sought the injunction after the University Interscholastic League declared Westlake High School the winner of the play-offs, even though Westlake had only won one game before the series was rained out. This Court rejected Richfield's equal protection challenge to the UIL rule that allowed Westlake to be declared the winner, finding that no fundamental right was involved and that the rational basis test was satisfied. In a concluding observation, however, the Court suggested as follows:

In ruling as we do, we wish to remind trial courts of the following language from *Mercer v. Board of Trustees*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.):

> We must be wise enough to perceive that constant judicial intervention in some institutions does more harm than good. We believe that there are some areas in which our intervention does not offer a practical solution. We make this observation in full sympathy with Judge Wisdom's statement in his dissent in *Karr v. Schmidt*, 460 F.2d 609, 619 (5th Cir. 1972): "Individual rights never seem important to those who tolerate their infringement." However, in this case we find our heavy hand ample reason for withholding it.

712 S.W.2d at 742.[26] The United States Supreme Court recognized similarly in *Rodriguez*:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. . . . In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

411 U.S. at 43, 93 S.Ct. at 1301-02, 36 L.Ed.2d 16 (citations and footnote omitted).[27] The complexity perceived by the United States Supreme Court in 1973 has not resolved itself in the intervening years. The same scholarly dispute as to whether money, over some minimal amount, has a significant impact upon educational quality was present before the trial court. [*See, e.g.*, SF 7084-7131] The complicated negotiations and delicate accommodations that produced House Bill 72 itself and its far-reaching educational reforms were amply documented.

The trial court, nevertheless, did not shrink back from this complexity, but charged in with a heavy hand to undo the work of House Bill 72 and to vaguely suggest that some other undefined

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[26] *See also Hernandez v. Houston Independent School District*, 558 S.W.2d 121, 124-25 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.): "The complexity of the problems of financing and managing a statewide public school system suggests there may be more than one constitutionally permissible method of solving them and that within the limits of rationality the legislature's effort to solve those problems should be entitled to respect."

[27] *See also Board of Education, Levittown v. Nyquist*, 439 N.E.2d 359, 363 (N.Y. 1982), *dism'd*, 459 U.S. 1138, 103 S.Ct. 775, 74 L.Ed.2d 986 (1983):

> The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity. This is of the very essence of our governmental and political policy.

system might be better. In this it departed from the wise approach taken by the United States Supreme Court, and fundamentally erred.

5.

Defining Education as a "Fundamental Right" Would Expose the State and Local School Districts to Potentially Crippling Litigation.

The result of labelling education a "fundamental" right for purposes of interpreting the equal protection clause will be that every legislative classification affecting education would have to withstand strict scrutiny—i.e., it would have to be demonstrated that each and every classification was justified by a compelling state interest and that the classification was the least restrictive means of achieving the interest. Does the State desire to target handicapped students with more educational dollars? Then it will have to demonstrate a compelling interest for doing so. Does it wish to make special provisions for students with AIDS or other contagious diseases? Then it will have to demonstrate a compelling interest and that the interest is being achieved through the least restrictive means possible. It may perhaps be said that compelling interests can readily be shown for such classifications as these, but the crucial point to be recognized is that not only these classifications but *every* classification that implicates education will be subjected to strict scrutiny. As previously noted, under traditional equal protection analysis, to categorize a given interest as fundamental is virtually to remove that interest from the legislative sphere. But education, of all interests, must remain in the legislative arena. It is not a liberty interest, but the provision of a governmental service. It is a creature of legislative budgets, and it automatically comes packaged in at least a certain amount of state regulation. It simply cannot survive under the heavy judicial hand of strict scrutiny.

The use of the test suggested by Petitioners to make education a fundamental right would also raise the possibility of creating a constitutional cause of action on the part of individual students against local school districts, or against the State itself, for educational malpractice in the administration of this allegedly "fundamental" right. The Petitioner districts have not all given sufficient thought to the burden under which they will be placed once subjected to a raft of suits complaining that students have not received that to which by right they are "fundamentally" entitled. This Court must think further ahead for them. Nor is the specter of educational

malpractice a mere phantom created by Respondents. It has received scholarly support as a viable cause of action on the part of students, and it can only be hastened to reality in Texas by raising education to "fundamental" status. *See, e.g.*, Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777 (1985).

6.

To Determine That Education Is a Fundamental Right Would Ignore the Provisions and History of the Texas Constitution.

The attempt to find a fundamental right to education under the equal protection clause conflicts with the clear historical intent of TEX. CONST. art. VII, § 1. Although Petitioners have fastened upon the requirement in that section that the legislature provide "an efficient system of public schools" to justify finding education a fundamental right under the Texas Constitution, this phrase was inserted by way of an amendment in 1876 for purposes exactly opposite those suggested by Petitioners. In the Constitutions of 1845, 1861, and 1866, section 1 had stated as follows:

> A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of public schools.

The Reconstruction Constitution of 1869 stated, however:

> It shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years.

The insertion into the Constitution of 1876 of the language relating to the Legislature's responsibility to provide an "efficient" system of free public schools was a deliberate limitation upon the State's role in the provision of education. The new provision was designed to diminish the constitutional significance of education, not turn it into a fundamental right. Moreover, the attempt to amend this section in 1976 to make the Legislature's responsibility that of providing for "the *equitable* support and maintenance of an efficient system of free public schools" which would furnish each individual with "an equal educational opportunity," was rejected by voters of the State.[28]

[28]For a full discussion of the history of TEX. CONST. art. VII, § 1, see argument under Reply Point No. 3, in the brief of Respondent Irving Independent School District.

The path charted by the trial court is the product of a disregard for the precedents of this Court, a simplistic appeal to *San Antonio v. Rodriguez*, a rejection of the broader context of that opinion, a departure from the decisions of a majority of state courts, an ignorance of the historical intent of the Texas Constitution, and a willful disregard of the certain and alarming consequences of the designation of education as a fundamental right. This Court need not abandon education and its importance to remain consistent with the overwhelming weight of authority declaring that in spite of its importance, education is not such a "fundamental" interest as to subject a state's financing scheme to strict scrutiny.

III.

THE COURT OF APPEALS CORRECTLY HELD THAT WEALTH IS NOT A SUSPECT CLASSIFICATION

In holding that wealth is a suspect classification for purposes of equal protection analysis, the trial court simply ignored established precedent and forged a new and utterly unworkable rule. The United States Supreme Court in *Rodriguez* specifically addressed claims that wealth was a suspect classification so as to subject the Texas School Finance System to strict scrutiny. The Court decisively rejected these claims. *See* 411 U.S. at 29, 93 S.Ct. at 1294, 36 L.Ed.2d 16. *See also Maher v. Roe*, 432 U.S. 464, 471, 97 S.Ct. 2376, 2381, 53 L.Ed.2d 484 (1977)(Court has "never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1203 (5th Cir. 1985)("Of course, wealth is not a suspect criterion . . . .").

The authors of 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 548 (1986) summarize the prevailing rule regarding wealth classifications:

> The constitutional protection for classifications burdening poor persons, sometimes called wealth classifications, can be described as nothing more than the protection given to any other classification of persons or business entities which are described by criterion which the Court does not regard to be suspect. The Court will uphold legislative actions which burden poor persons as a class under the equal protection or due process guarantee if the actions have any rational relationship to a legitimate end of government. So long as these laws do not involve the allocation of fundamental rights, the Court will consider them to be regulations concerning economic and social welfare policy. As such, these laws have no relationship to values with constitutional recognition so as to merit active judicial review under the strict scrutiny-compelling interest standard.

Petitioners Edgewood I.S.D., *et al.*, apparently agree with this summation. In their brief before this Court they state as follows:

> The general holdings of these Supreme Court cases and other state supreme court cases are that wealth is a suspect classification when a fundamental right is impinged upon by the state's use of a classification based on wealth.

Edgewood Brief at 41. Respondents suggest that this summation makes the whole question of whether wealth is a suspect classification irrelevant to the present consideration. Either the presence of a fundamental right *or* a suspect classification will subject a legislative classification to strict scrutiny. If education is a fundamental right, then *any classification* is essentially suspect—whether classification by wealth or otherwise—and will be subjected to strict scrutiny. The important point, and one upon which the parties appear to be in agreement, is that without the presence of a fundamental right, wealth—by itself—is not a suspect classification. Therefore, classifications based upon wealth will not be subject to strict scrutiny in the absence of a fundamental right. Respondents, of course, have argued that education is not a fundamental right for purposes of equal protection analysis and, hence, that any classification according to wealth will be reviewed just as other classifications—under the rational basis test.

IV.

THERE IS NO "MID-LEVEL" SCRUTINY FOR EDUCATIONAL MATTERS

Petitioners have suggested that the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), established, post-*Rodriguez*, a mid-level scrutiny for education matters under equal protection analysis. *See* Edgewood Brief at 34. This assertion is simply false. The Court in *Plyler* held that Texas' absolute exclusion of aliens from the benefits of public education could not be considered rational unless it furthered "some substantial goal of the State." 457 U.S. at 224, 102 S.Ct. at 2393, 72 L.Ed.2d 786. In so holding, the Court did indeed appear to be applying something more than a simple rational basis test. However, the Court did not apply such an elevated test simply because education was involved. Rather, it was because an important social advantage—education—was wholly denied a discrete minority—undocumented aliens. *See id.* at 221-23, 102 S.Ct. at 2396-98, 72 L.Ed.2d 786. It was the convergence of these two factors that called into play a heightened scrutiny.

That the Supreme Court was not establishing a new level of scrutiny for education matters *per se* was amply demonstrated by the Court's decision in *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). There the Supreme Court considered several challenges to Mississippi's distribution of public school land funds, including an equal protection challenge. Although the Court speculated as to whether a legislative classification that totally deprived some children of a "minimally adequate education" would be accorded "heightened equal protection review," it found no allegation of such a total deprivation and moved immediately to rational basis review. *See* 478 U.S. at ___, 106 S.Ct. at 2944-45, 92 L.Ed.2d 209.[29]

More recently, the Supreme Court has again reiterated that the intermediate scrutiny applied in *Plyler* did not amount to a general rule for education cases. *See Kadrmas v. Dickinson Public School*, ___ U.S. ___, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988). There, in upholding a North Dakota statute that allowed some school districts to charge a user fee for school bus transportation, the Court applied rational basis analysis. The Court noted, with respect to the heightened scrutiny used in *Plyler*, that its holding had not been extended beyond the unique circumstances of *Plyer*. ___ U.S. at ___, 108 S.Ct. at 2487-88, 101 L.Ed.2d 399. Once again, the Court held that education was not a fundamental right, and concluded that the applicable classification satisfied the rational basis test. ___ U.S. at ___, 108 S.Ct. at 2487, 2491, 101 L.Ed.2d 399.

Petitioners' citation to numerous state court decisions as having applied an intermediate level of scrutiny is partially erroneous and wholly irrelevant to the present case. *See* Edgewood Brief at 44 n. 13 and accompanying text. At least two of the cases cited by Petitioners as having applied intermediate scrutiny did nothing of the kind—they applied rational basis analysis. *See Commonwealth v. Bell*, 516 A.2d 1172, 1179 (Penn. 1986); *Leliefeld v. Johnson*, 659 P.2d 111, 128 (Idaho 1983). The remaining citations, while indeed illustrating the use of intermediate scrutiny, are beside the point. That federal courts and at least some state courts have used an intermediate level of scrutiny for some equal protection cases is not disputed by Respondents. The crucial question, and the one for which Petitioners' citations provide no answer, is when the use of

[29]Although the Court questioned whether some "minimally adequate education" was a fundamental right, it found that the deprivation of such a "minimally adequate education" had not even been alleged where there was no allegation that "schoolchildren . . . are not taught to read or write; they do not allege that they receive no instruction on even the educational basics . . . ." ___ U.S. ___, 106 S.Ct. at 2944, 92 L.Ed.2d 209. There was, in the present case, neither allegation nor evidence offered that any school children in Texas "are not taught to read and write."

this middle-tier analysis is appropriate. That such an analysis has been used in a challenge to a statute of repose, *see Hanson v. Williams County,* 389 N.W.2d 319 (N.D. 1986), or a challenge to a statute prohibiting retired judges on pensions from practicing law, *see Attorney General v. Waldron,* 426 A.2d 929 (Md.Ct.App. 1981), or challenges to various statutes relating to the calculation of time served by prisoners in reducing their sentences, *see State v. Cook,* 679 P.2d 413 (Wa. 1984); *State v. Phelan,* 671 P.2d 1212 (Wa. 1983); *Sheppard v. State Department of Employment,* 650 P.2d 643 (Idaho 1982), does not enlighten the present discussion. What Petitioners want, but cannot find, is a reference to a single case in which "middle-tier" scrutiny has been applied to an equal protection challenge involving a school finance system.[30]

V.

THE COURT OF APPEALS CORRECTLY HELD THAT THE TEXAS SCHOOL FINANCE SYSTEM IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

The burden of Petitioners in attempting to demonstrate that the Texas School Finance System failed to meet the rational basis test was heavy. The review of the system proceeds from the presumption that the system is constitutional, *see Spring Branch Independent School District v. Stamos,* 695 S.W.2d 556, 559 (Tex. 1985), *appeal dism'd,* 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986), and Petitioners simply failed to carry this extraordinary burden.

A. The Rational Basis Test.

At the heart of the trial court's error in this case was its apparent adoption of a new and unprecedented form of rational basis analysis advocated by the Petitioners below. The Petitioners have tipped their hand and revealed that they are seeking a change in equal protection analysis that would turn the courts into a super-legislature justified in striking down laws merely if a court found such a law "not rational." By not rational, Petitioners mean simply, "Not the best idea, not the wisest way of doing things." This understanding of "rationality" may be an appropriate use of language at a popular level; but the "rational basis test" is a term of art in equal protection analysis whose meaning does not simply echo common lay-usage.

[30]Petitioners' assertion that both federal and state courts are applying a "sliding scale" approach to equal protection analysis is unsupported and blatantly erroneous. *See* Edgewood Brief at 45-46. Isolated holdings by the supreme courts of Alaska and Montana hardly amount to a general rule. In fact, as previous discussion disclosed, neither this Court nor the United States Supreme Court have adopted Petitioners' so-called "sliding scale."

The rational basis test is not an opportunity for a court to decide what it thinks is the best way of solving some social problem. "Is this the best way of doing things?" is a legislative, not a judicial, question. Accordingly, the courts, consistently and wisely, have articulated the rational basis test as one in which the deck is stacked in favor of legislative enactments.

The Petitioners have attempted to fashion a new rational basis test that would make judges unrestrained arbiters of legislative wisdom. Their chief stratagem in this enterprise is to characterize two cases decided by this Court in the 1980s as radical changes in Texas law that have turned the Texas equal protection clause into a thing unrecognizable by federal and other state courts. Petitioners' interpretation of Texas law is erroneous, however.

Petitioners Alvarado I.S.D., *et al.*, have suggested that Texas equal protection analysis fundamentally changed with the opinions of this Court in *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex. 1981), and *Whitworth v. Bynum*, 699 S.W.2d 194 (Tex. 1985). Alvarado Brief at 26-31. Petitioners Edgewood I.S.D. *et al.*, assert that "[t]he Texas 'rational basis test' is a significantly more searching inquiry than is the Equal Protection rational basis standard under federal law. Edgewood Brief at 42. As the discussion below demonstrates, both briefs are wrong.

Alvarado contends that this Court in *Sullivan* rejected the test articulated by the court in *Hernandez v. Houston Independent School District*, 558 S.W.2d 121, 123-24 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), which stated:

> The presumption [of constitutionality accorded a statute] may not be disturbed unless the enactment rests upon grounds wholly irrelevant to the achievement of a legitimate state objective.[31]

Instead, Petitioners assert that a new test is being used, although they are apparently unwilling or unable to state exactly what the new test is. In any event, Petitioners allegations of a fundamental change in Texas are in error.

First, in *Sullivan* this Court did not give any hint that it was creating a new breed of equal protection analysis under the Texas Constitution to be distinguished from federal equal protection analysis. In reciting the rational basis test as one requiring that "the classification be rationally

[31]This language is taken from the opinion of the United States Supreme Court in *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

related to a legitimate state interest," the Court cited United States Supreme Court decisions as its authority. *See* 616 S.W.2d at 172. In *Whitworth v. Bynum,* 699 S.W.2d 194 (Tex. 1985), this Court declined to follow federal precedent in considering the constitutionality of the Texas guest statute under an equal protection challenge. It did not, however, articulate a new rational basis test. It simply applied the same test always applied under both federal and Texas equal protection analysis to reach a conclusion that varied from a vintage federal precedent decided before the advent of contemporary equal protection analysis.

Second, neither this Court nor the Texas courts of appeal have recognized any change in equal protection analysis as a result of *Sullivan* or *Whitworth.* In *State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987), this Court upheld House Bill 72 against federal and state equal protection challenges without setting forth any different standards for the two constitutional provisions. Moreover, the Corpus Christi Court of Appeals has recently stated what is implicit in most equal protection cases decided by Texas courts: that both the federal and the Texas equal protection clauses are attended by the same requirements. *See Twiford v. Nueces County Appraisal District,* 725 S.W.2d 325, 328 n.5 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). This explicit declaration is no more than an affirmance of the actual practice of Texas courts in construing equal protection issues.[32]

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[32]For example, in *Richards v. State,* 743 S.W.2d 747 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd), the Houston Court of Appeals upheld the constitutionality of the Texas seat belt law, TEX. REV. CIV. STAT. ANN. art. 6701d, § 107C (Vernon Supp. 1988), from federal and state equal protection challenges. In doing so, it quoted from *McGowan v. Maryland,* 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L. Ed.2d 393 (1961), the same language used by the court in *Hernandez* and to which Petitioners now object:

> [T]he rational basis test is used to determine whether the varied treatment of separate classifications "rests on grounds wholly irrelevant to the achievement of the state's objective."

Similarly, in *Smith v. Smith,* 720 S.W.2d 586, 598 (Tex. App.—Houston [1st Dist.] 1986, no writ), the Houston Court of Appeals considered equal protection challenges to portions of the Texas Family Code under both the United States Constitution and the Texas Constitution. In finding no violation of equal protection under either constitution, the court did not bifurcate its analysis, with one discussion for the federal equal protection clause and another for the Texas counterpart. Rather, it cited a single test based upon the opinion in *Humble v. Metropolitan Transit Authority,* 636 S.W.2d 484 (Tex. App.—Austin 1982, writ ref'd n.r.e.), *dism'd,* 464 U.S. 802, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983):

> A rational basis for a statutory classification exists if any state of facts may be reasonably conceived to justify the scheme.

720 S.W.2d at 598. For other cases applying a single analysis to resolve both federal and Texas equal protection challenges, see, e.g., *Rose v. Doctors Hospital Facilities,* 735 S.W.2d 244, 249 (Tex. App.—Dallas 1987, writ granted); *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance,* 685 S.W.2d 104, 110 (Tex. App.—Austin 1985, no writ); *Humble v. Metropolitan Transit Authority Co.,* 636 S.W.2d 484 (Tex. App.—Austin, writ ref'd n.r.e.), *dism'd,* 464 U.S. 802, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983).

There is therefore no justification for arguing that the rational basis test is anything different for the Texas equal protection clause than it is for the federal equal protection clause. Under either constitutional provision, state or federal, the courts have taken and continue to take a narrowly constricted role in reviewing the decisions of legislatures when fundamental rights and suspect classifications are not involved. A rigorous presumption supports every legislative enactment under these decisions. *See Tarrant County Hospital District v. Ray*, 712 S.W.2d 271, 273 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it." (citation omitted))(upholding Texas Tort Claims Act against federal equal protection challenge).

B. The Texas School Finance System Is Rationally Related to the Legitimate State Interest in Maintaining Some Degree of Local Control Over Education.

1.

The Trial Court's Findings Were Not Insulated From Review

The Court of Appeals found that "[u]tilizing local property taxation revenues to partly finance free public schools is rationally related to effectuating local control of education." 761 S.W.2d at 864. Petitioners contend that the Court of Appeals should have deferred to the trial court with respect to its findings on the alleged irrationality of the present system. *See* Point of Error No. 9 of Petitioners Edgewood I.S.D., *et al.* In doing so, they rely wholly upon this Court's recent decision in *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746 S.W.2d 203 (Tex. 1987). Petitioners have specifically concentrated upon language in *Texas State Employees Union* that stated: "Factual determinations as to the nature of the state's objective and the reasonableness of the means used to achieve it are properly made by the trial court." *Id.* at 206. There are at least three reasons why the Court of Appeals was not foreclosed from reviewing the trial court's findings regarding whether the Texas system of school finance satisfied the rational basis test.

First, this Court in *Texas State Employees Union* did not say that it was *bound* by the trial court's findings. A reading of the opinion quickly demonstrates that it in fact reviewed the trial